85-1002

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA

v.

ROBERT CIAMPITTI, ALBRECHT AND HEUN CORPORATION, BRUCE CIAMPITTI AND PACIFIC FOUR CORPORATION, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the term "normal" high tide line is synonymous with the term "mean" high water line as was previously held in *Borax Consolidated, Ltd. v. Los Angeles*, 296 US 10 (1935).

2. Whether the subject property was properly classified as "wetlands" under the Federal Water Pollution Control Act, more commonly known as the Clean Water Act, 33 USC 1251, et seq., subject to the jurisdiction of the United States Army Corps of Engineers, where it is not regularly flowed by tide, and not inundated.

LIST OF PARTIES TO THE PROCEEDINGS

United States of America, Plaintiff

Diamond Beach Development Corporation-Defendant/ Petitioner

Robert Ciampitti - Defendant/Petitioner

Albrecht and HEUN Corp. - Defendant

Specific Four Corporation - Defendant/Petitioner

Bruce Ciampitti - Defendant/Petitioner

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JURISDICTION

Judgment of the Court of Appeals was entered on August 7, 1985. The jurisdiction of this court is invoked by way of a Petition for Writ of Certiorari under 28 USC 1254(1), the same having been timely filed pursuant to 28 USC 2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Federal Water Pollution Control Act, 33 USC 1251, et seq.
2. United States Army Corps Regulations, 33 CFR 323.2 (1983)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985
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UNITED STATES OF AMERICA

v.

ROBERT CIAMPITTI, ALBRECHT AND HEUN CORPORATION, BRUCE CIAMPITTI AND PACIFIC FOUR CORPORATION, PETITIONER

PETITION FOR A WRIT OR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Alfred A. Porro, Jr., on behalf of Petitioners, Robert C. Ciampitti, et als., Petitions for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Third Circuit in this case entered on August 7, 1985.

STATEMENT

This matter involved a substantially developed tract of land approximately 25 acres located in the Township of Lower, Cape May County in the State of New Jersey. A 1907 riparian grant was issued to defendants predecessors in title vesting all title and interest of the State in the Grantee, thereby conferring the right to dredge, fill and develop the subject property. (Exhibit p. 82 & 87). Subdivision of the site dates back to 1920 (Vol. IV p. 1193) and was recently upheld by the Superior Court of New Jersey.[1]

Located on the site is a railroad embankment which historically separates this tract from a bay area. An artificially constructed breach in the embankment

[1] *Diamond Beach Joint Venture Association v. Township of Lower, et als.*, Superior Court of New Jersey, Law Division, Docket No. L-46263-78, rendered by the Honorable Robert H. Steadle in March of 1980.

which came into existence between 1962 and 1969 connects various manmade mosquito ditches placed on the site to alleviate poor upland storm drainage. (Vol. II. 533.535).

Elevation of the site ranges from 3.75 to 6 or 7 feet above the mean high water line, in some instances to 8 or 9 feet. As a whole the site is 1 to 1 1/2 feet above the mean high water line. (Exh. p. 467).

Pursuant to the 1907 Grant from the State of New Jersey the 1929 subdivision and recent Municipal, County and State of New Jersey Department of Environmental Protection permits, a substantial portion of the property is under development with existing roadways, sewers and utilities having been installed.

A major portion of the subject property is alleged to be "wetlands". Jurisdiction of the Corps is asserted under the Federal Water Pollution Control Act, more commonly known as the Clean Water Act, 33 USC 1251 et seq. Both parties agree that only a small percentage (1.45 acres) of the site falls below the mean high water line.

OPINIONS BELOW

Appellant property owners seek review of a permanent injunction entered by the New Jersey District Court, subsequently affirmed by the 3rd Circuit Court of Appeals, enjoining the filling and future development of the subject premises and ordering the restoration of the site via removal of all roads, sewers and improvements, in an effort to convert this development into wetlands.

This matter was opened to the Court on October 24, 1982 on and Order to Show Cause and a Temporary Restraining Order by plaintiff seeking to enjoin defendants from further development of the 1980 subdivision. (Vol. I p. 4 & 7). A Verified Complaint seeking permanent injunctive relief was subsequently filed and a request for restoration of the site and

conversion into wetland in accordance with the Clean Water Act, 33 USC 1251 et seq. and the Rivers and Harbors Appropriation Act of 1899, 33 USC 403 and 407. Said complaint was later amended to allow for additional defendants.

After several days of depositions, the trial court issued an opinion on April 2, 1984, entering an Order for Preliminary Injunction thereby preventing further development of the property. *United States v. Ciampitti*, 583 F.Supp. 483 (D. NJ 1984). (Vol I p. 63-78). It was held that the site in question constituted wetlands and that the defendants had discharged fill material without obtaining a permit in violation of the Clean Water Act.

Additional testimony was taken at a hearing on the issuance of a permanent injunction. A final Order was issued on November 28, 1984 permanently restraining defendants from developing the site and ordering restoration through the removal of sewers, roadways and improvements and ordering the conversion of the tract into "wetlands". The Court determined that the site (except for 1.45 acres) was above mean high water. It then decided the tract was below normal high tide. Provisions with respect to restoration were stayed pending submission of a permit application to the Army Corps of Engineers. *United States v. Ciampitti*, Superior Court of New Jersey, Law Division, Docket No. 83-4004.

Appeal was taken to the 3rd Circuit Court of Appeals. A decision affirming the Trial Court's determination was entered on August 7, 1985. *United States v. Diamond Beach Development Corp. and Robert Ciampitti, et als.*, Superior Court of New Jersey, Law Division Docket No. 85-5004 argued August 6, 1985.

Review by the United States Supreme Court on a Writ of Certiorari is sought pursuant to Fed. R. Civ. P. 17 (1) (a) in that a conflict between the holding of the lower court

and applicable decisions which were previously entered by the United States Supreme Court. Review is additionally sought under Fed. R. Civ. P. 17 (1) (a) in that the Court of Appeals holding relative to an application of jurisdictional standards to which the Corps is subject under the Clean Water Act is in conflict with the application of the requisites in *United States v. Bayview Homes*, 729 F. 2d 391 (6th Cir. 1981) cert. granted, Docket No. 84-701, argued Oct. 16, 1985.

REASONS FOR GRANTING CERTIORARI

1. THE NEW JERSEY DISTRICT COURT'S HOLDING WITH RESPECT TO LANDS BEING ABOVE THE MEAN HIGH WATER LINE AND SIMULTANEOUSLY BELOW ORDINARY HIGH TIDE ARE IN DIRECT CONFLICT WITH THE PRINCIPALS ESTABLISHED BY THE UNITED STATES SUPREME COURT IN *BORAX CONSOLIDATED, LTD. v. LOS ANGELES*, 296 US 10, 80 L.ed. 9, 56 S.Ct. 23 (1935).

A. Lands were held to be above the mean high water line and simultaneously below the ordinary high tide line by the Trial Court.

It is undisputed that the Trial Court found the premises in question to be above the mean high tide with the exception of 1.45 acres. Judge Gerry in his November 28 Opinion found only a small portion of the tract to be below the mean high water line.

> "Of the 26.72 acres of land within the Diamond Beach site .... the government claims that 1.45, all within the area designated as wetlands, are below the *mean* high water line.

November 28 1984 Opinion p.3.

In ruling that the government failed to carry its burden of proof regarding areas asserted by them to be tidal flowed and below the mean high water line the Court Stated:

> "Somewhat less than 1.45 acres therefore, is below the *mean* high water line. . ." emphasis supplied.

Conversely, in granting plaintiff's application for Preliminary Injunctive Relief the Trial Court in its April 2, 1984 Opinion designated parts of the site as below normal high tide and thus "wetlands" within the context of the Corps regulations promulgated to enforce the Clean Water Act (hereinafter CWA). In so holding the Court stated:

> "During *normal high tide* conditions surface water covers a majority of the site...over fifty percent of the site was covered during an inspection on November 4, 1984...". emphasis supplied.

District Court Opinion, April 2, 1984 p.9.

These findings were relied upon by the Trial Court in reaching its Opinion of November 28, 1984 wherein permanent injunctive action was taken. November 28, 1984 Opinion, p.7. Discussing the jurisdiction of the Corps under the CWA the Court emphasized the fact that although not determinative, the issue of whether lands were located below the normal mean high line were relevant considerations in a finding that a parcel constitutes "wetlands". Once again, the Court therein made reference to its earlier holding that a majority of

the 26.72 acres in question was allegedly below the demarcation of the normal or ordinary high tide.

Based upon the same evidence and within the confines of the November 28 Opinion, the District Court has held that a "majority" of the 26.72 acre tract lies below the "normal" or ordinary high tide while simultaneously, in contradiction thereof, making the determination that less than 1.45 acres were below the mean high water line.

B. Borax Consolidated, Ltd. v. Los Angeles

Since the landmark ruling in *Borax Consolidated, Ltd. v. Los Angeles*, 296 US 10 80 L.ed. 9, 56 S.Ct. 23, (1935), there can be no question that the term "ordinary high water mark" is synonymous with "mean high water mark". *Shalowitz, Shore & Sea Boundaries, US Dept. of Commerce Coast & Geodetic Survey*, US *Shore & Sea Boundaries*, Gov't. Printing Office, Volume 1, §6413. Although the United States Coast and Geodetic Survey, the government branch which compiled the Tidal Datum Surveys has not standardized the term for technical engineering purposes, when used in relation to tides, the phrase is said to be the equivalent of the term "mean". *Schureman Tide & Current Glossary*, 23, Special Publication No. 228, USC & GS (1949).

Borax involved a suit to quiet title to land claimed to be tideland. The City of Los Angeles asserted title under a prior State Legislative Grant. Borax claims title in fee simple was vested in it by virtue of a prior federal patent. Initially the action was dismissed, the District Court holding that a federal grant could not be attacked collaterally. *The City of Los Angeles v. Borax*, F.Supp. 281 (D. 1934). On appeal the Circuit Court held the challenge to be proper. The issue as to location of the ordinary high water mark was said to be one for judicial determination and the matter was remanded

for retrial within the perimeters of the meaning of ordinary high water mark as defined by the Court. 74 F.2d 901 (Cir. 1935). Appeal was made to the United States Supreme Court.

At issue in the Supreme Court review was whether the ordinary high "water mark" which marked the boundary between the land conveyed to Borax's predecessors in title and the tidelands to which the State had power to convey was to be the "mean high tide line"[2] as defined by the lower court or "neap tide"[3] line. 296 US at 23.

Prior to Borax it had been established that tidelands belonging to the State extended to the high water mark. *Hardin v. Jordon*, 140 US 381, 35 L.ed 433, 11 S.Ct. 808, *838; Shilney v. Bowlby*, 152 US 1, 38 L.ed 331, 14 S.Ct. 548. What was yet unresolved was exactly where the line of demarcation of the mean high water mark would lie. Given the constant ebb and flow of the sea along the shore line the *Borax* Courts acknowledged that the boundary would lie between the ordinary "high and low water mark". 296 US at 22. The exact line of the demarcation was to represent a "mean of all high tides"[4]. 296 US at 26.

[2] 74 F.2d 906 Mean high tide line was defined as the average high tide over the course of 18.6 years.

[3] Neap tides are those which occur when the moon is in its first and third quarters thereby causing the tide to rise not as high or as low as on the average.

[4] In adopting the "mean" approach the court rejected use of the "spring tide" line, that being the range of tide at the time of the new moon and full moon at which point the water rises higher and falls lower than usual. Also rejected was the "neap tide" standard. Such occurs when the moon is in the first and third quarter whereby the tide fails to rise at high or fall as low as on the average. 296 US at 23 citing Tidal Datum Plane USC & GS, Special Publication No. 135 p.3.).

"Mean high water" was hitherto defined by the USCGS, now NOAA, as the "average height of all high waters at (a given) place over a considerable period of time". Given the variations in tidal water levels over the course of 18.6 years, the Supreme Court was in accord with the Court of Appeals and chose to adopt such a span of time as the requisite period over which tides were to be observed in order to establish the "mean" or "ordinary" high water line. 296 US at 27.

In sum, the Supreme Court in *Borax* utilizing the terms "ordinary high water mark" and "mean high water mark" interchangeably established the scientific standard to be employed in determining its line of demarcation. For decades "ordinary" and "mean" high tide have been declared to be the same.

C. The Decision of the Trial Court conflicts with the mandates of the United States Supreme Court in *Borax Consolidated, Ltd v. Los Angeles.*

Of crucial importance to the court in this Petition for Certiorari is the lower courts conflict with Borax. In particular, the trial court through its use of the terms "normal" and "mean" as its relates to the flow of tides has failed to follow the well established doctrine of the United States Supreme Court. In its decision the trial court found that less than 1.45 acres of the 26.72 of land were below the mean high water line. Directly opposed to this is the determination that the normal high tide flows over the majority of the property.

Use of the term "ordinary" in Borax is synonymous to the Trial Courts utilization of "normal" in its opinion as they both relate to the designation of tidal marks. *Funk & Wagnalls International Dictionary, New Comprehensive International Dictionary of the English Language, Encyclopedia Edition, JG Ferguson Publishing Co.* (1980), defines "ordinary" as:

"of common or everyday occurence. . . usual. . . regular. . . normal. . ."

In that only 1.45 acres are tide flowed, the balance of the property is non-tidal and the decision of the Trial Court must be reversed. Reveral of the Trial Court's holdings relative to its finding of wetlands would result in the determination that the lands in question were not federally protected wetlands and thus not subject to U.S. Army Corps of Engineers jurisdiction under the CWA.

D. Impact of Federal Water Pollution Control Act on Trial Court Decision that the property constituted wetlands.

The Federal Water Pollution Control Act, more commonly referred to as the Clean Water Act (CWA), 33 USC 1251 et seq. was designed to eliminate the discharge of pollutants into the nations waters, 33 USC 1231 (a) (1). While any discharge of defined pollutants, including dredged spoil, rock and sand, 33 USC 1362 (b) is presumptively unlawful, 33 USC §1311, jurisdiction is vested in the United States Army Corps of Engineers pursuant to §404, 33 USC 1344 having authority to oversee subject areas and to grant permission of the disposal of the dredged or fill material through the medium of permits. Under the terms of the Act the Corps was to promulgate regulations to serve as a basis for evaluating the advisability of a permit which is to be issued only in such circumstances as will not have an adverse impact on work quality. 33 USC 1344(b) 40 CFR §230 (1983).

The CWA defines the "navigable waters" over which it has jurisdiction as "the wates of the United States including territorial seas". Section 502(7), 33 USC §1362 (7). Although "wetlands" is no where mentioned or defined in the Act itself, the Corps when promulgating regulations determine that "wetlands" are encompassed by the term "waters of the United States"

and thus are within the intended scope of the Act. Wetlands are specifically defined in 33 CFR 323.2(c) (1983) as:

> "Those areas the are inundated and saturated by surface or ground water in a frequency or duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas".

To qualify, a wetland must be "adjacent" or "bordering contiguous or neighboring"to navigable waters and their tributaries. 33 CFR 323.2(d).

Jurisdiction of the Corps and applicability of the CWA provisions over the subject property are therefore dependent upon the finding that the site constitutes wetlands adjacent to navigable waters or its tributaries. Three facts have generally been considered by the Corps in determinations of wetland designations within 33 CFR 323.2(c): (1) soil conditions; (2) vegetation and (3) the degree and frequency of inundation. *Avoyelles Sportsmen's League Inc. v. Marsh*, 715 F.2d 897, 906 (5th Cir. 1983); *Weismann v. U.S. Army Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976); *U.S. v. Riverside Bayview Homes*, 729 F.2d 391 (6th Cir. 1984) cert. granted, Docket No. 84-701 argued on October 16, 1985.

Although the focus of this Petition is upon the third prong of the test respecting inundation, brief mention is made of evidence of soil conditions and vegetation upon the site so that the court may have an overview of the proofs presented below.

Attempts by the United States to demonstrate that the hydrology of the area typified wetlands was not

presented by a duly qualified expert in hydrology and hence should have been deemed inadmissible in accordance with Fed. R. Evid. 702. Further, no salinity tests were conducted by the Corps despite its assertion that the site was subject to tidal flow from Jarvis Sound, a saltwater body adjacent to the Atlantic Ocean. Tests performed by experts on behalf of Ciampitti unquestionably demonstrate the absence of saltwater on the site. (Vol. II, p. 535, 587).

Relative to vegetation present on the site, it was demonstrated at the trial that while some forms of plant life which survive in wetland areas were located on the tract, such vegetation is also typically found on upland areas and hence the presence of any such plants is not indicative. (Vol. II, p. 546-571). No evidence was presented from which it could be concluded that the viability of the vegetation in question was dependent upon tidal flow.

At issue in this Petition are the lower courts' findings relative to inundation and saturation of the Ciampitti site, the third prong of the Corps wetlands test. If the Trial Court and Court of Appeals' determinations are found to be in conflict with the *Borax* case, supra, and accordingly overruled, the determination that the site is inundated and saturated with water sufficient to allow a "wetlands" designation cannot stand. Such tract not constituting federally protected wetlands would not be the intended subject of the CWA nor would the Corps have a right to regulate the development of the site.

In that the Corps has failed to assert jurisdiction premised on the presence of ground water on the Ciampitti site, alleged tidal flow is the only basis upon which jurisdiction can rest.

Absent frequent inundation and saturation by tidal waters resulting in the ability to support wetlands vegetation it cannot be concluded that a "wetlands" within the CWA exists. Absent such a wetland, no jurisdiction exists over the site under the provisions of the Act.

While tidal flow of property is not in and of itself a prerequisite to Corps jurisdiction under the CWA, it is relevant in determining whether the lands in question are "inundated and saturated by surface or ground water". To such an extent as will support vegetation adapted for life in such saturated soil conditions, thereby constituting wetlands as defined in 33 CFR 323.2(c).

With respect to the question of tide flow as was previously set forth herein in detail, the trial court in its decision on a preliminary injunction issue concluded that a majority of the site was covered by water during "normal" high tide conditions. Conversely, in its final determination, the trial court held that a mere 1.45 of the 26.72 acres of land were above the mean high tide line.

In comparing the definitions of ordinary or "normal" high tide with "mean" high tide the United States Supreme Court concluded that the phrases are synonymous. *Borax Consolidated v. Los Angeles*, supra. Use of the respective terms in a manner in which two different results are reached (i.e. 1.45 acres are tide flowed as compared to 50 percent or approximately 13 acres) is in conflict with the *Borax* mandates and thus must be overruled.

2. THE FEDERAL OF APPEALS FOR THE 3RD CIRCUIT HAS RENDERED A DECISION WHICH IS IN CONFLICT WITH THE 6TH CIRCUIT IN *U.S. v. RIVERSIDE BAYVIEW HOMES*, 729, F.2d 391 (6TH CIR. 1984) CERT. GRANTED, DOCKET NO. 84-701, ARGUED ON OCTOBER 16, 1985.

A. *U.S. v. Riverside Bayview Homes* **is Analogous to** *U.S. v. Ciampitti.*

The 6th Circuit in *United States v. Riverside Bayview Homes* 729 F.2d 391 (6th Cir. 1984) cert. granted, Docket No. 84-701 agrued on October 16, 1985, clarified the regulatory definition of "wetlands". 33 CFR 323.2(c) (1983) defining the prerequisites necessary to support a determination of jurisdiction by the Corps resting upon a finding that a particular site constituted federally protected wetlands subject to the CWA.

Riverside, which was recently heard by this Court on October 16, 1985 is directly analogous to the case at bar. Both cases involved situations wherein the government sought a permanent injunction against the filling of a site without Army Corps of Engineers permits having been granted for the same. Both the Riverside property and the Ciampitti property are located in suburban areas and have been previously plotted as subdivisions, ironically both in the early 1900's. Like the Ciampitti property, the Riverside property was originally surrounded by dikes which prevented any tide flow or water flow onto the property whatsoever. The dike involved on the Riverside property was eventually destroyed allowing some drainage onto the property. Likewise, in the case at hand, a substantial railroad embankment surrounds the property cutting off all major tidal flow.

which embankment is solid except for a breach which allows storm water run off to leave the site and escape onto surrounding properties.

After a series of appeals, it was determined that 33 CFR 323.2(c) (1983) was the applicable definition pursuant to which it must be determined whether the property in fact constitutes wetlands. This is the precise definition which governs the case at bar. After analyzing the definition of "wetlands" contained within 33 CFR 323.2(c) the Court of Appeals for the 6th Circuit held that before a finding that a piece of property constitutes wetlands may be made, the plaintiff must demonstrate that both the property is inundated by tidal flow and that aquatic vegetation exists on the site. Both must be present and the existence of the aquatic vegetation has to have been caused by the inundation in question.

After extensively examining the history behind this regulation, the Court of Appeals for the 6th Circuit concluded:

> "Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former.
>
> Were this not so, then areas which inexplicably support some species of aquatic vegetation, but which are not normally inundated, would fall within the wetlands definition. Such a preverse result could not have been what the court contemplated in promulgating the regulation. Indeed as noted earlier, the Corps expressly adverted to the situation of "area that are not aquatic but experience an abnormal presence of aquatic vegetation" and emphasize that such lands were not intended to be covered by the regulations. (at p. 396)".

Applying this standard in the Riverside case, the 6th Circuit Court of Appeals held that the government had failed to meet its burden of proof insofar as it was unable to demonstrate that the vegetation found on the property, although it could consist of wetlands vegetation, had been caused by the inundation of the property or in fact that the property was inundated or flooded at a frequency and duration sufficient to support wetlands vegetation under normal circumstances.

B. The 3rd Circuit Holding is in Conflict with the 6th Circuit Court.

Relying on the *Riverside* case, petitioners at the time of trial in this matter have contended that in fact absolutely no proof had been offered by the government to show that the premises in question had been inundated or flooded at a frequency or duration sufficient to support or that it does support wetlands vegetation under normal circumstances.

The trial court in issuing a permanent injunction found that a mere 1.45 of the 26.72 acres in question were flowed by the ordinary or normal high tide and hence could be classified as inundated. Although the trial court attempted to comply with the *Bayview* standard, it did so incorrectly, its decision being in direct conflict with the 6th Circuit. In reaching its determination the trial court merely concluded that the presence of vegetation considered together with the presence of some saturated soil conditions and the presence of some water on the site was sufficient to meet the *Riverview* test.

Riverside requires that the vegetation present on the site be demonstrated to have been precipitated by the waters which inundate and saturate soil. 729 F.2d at

396. It follows that areas which support aquatic vegetation although not inundated are not within the purview of federally protected wetlands.

At trial no evidence was presented to support the findings that on-site vegetation was caused by tidal waters which inundated the lands. On the contrary, Ciampitti's experts testified to the fact that the plant life in question could exist on non-wetland sites.

Relative to the question of inundation and saturation evidence in the record does not support a finding of inundation sufficient to meet the Riverside test. The Corps visited the site shortly after extremely heavy rain storms, not during the average dry conditions. Flooding caused by storm water in and of itself is not sufficient to base a determination of inundation under the Riverside standard. Furthermore, with respect to tidal waters, the trial court held that 1.45 acres of the entire 26.72 acre tract was flowed by normal tide waters. Designation of an entire tract as wetland subject to CWA and Corps permit requirements based on such a nominal area is contrary to Riverside's mandate that federally protected wetlands be "inundated and saturated"

Thus, the determinations of the 3rd and 6th Circuits with regard to the requirements sufficient to designate a parcel as "wetlands" are in conflict

CONCLUSION

In that the Trial Court and Circuit Court decisions are in conflict with those previously entered by the United States Supreme Court and are further in conflict with those of other Circuits, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

ALFRED A. PORRO, JR.
Attorney for Petitioners,
Robert Ciampitti, et als.

DATED: November 4, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT CIAMPITTI, ALBRECHT AND HEUN CORPORATION, BRUCE N. CIAMPITTI and PACIFIC FOUR CORPORATION,

Defendants.

Civil Action No. 83-4004

OPINION

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GERRY, District Judge

This matter is before the court on the Government's request for a preliminary injunction. It wants to prevent the defendants from engaging in fill activities at the Diamond Beach site in Cape May County, New Jersey, which the Government contends contains federally regulated wetlands.

The Government is proceeding under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (hereinafter "Clean Water Act") and the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407 (hereinafter "Refuse Act").

A hearing was held on November 9, 15 and 17, 1983. The court had previously issued a temporary restraining order on October 24, 1983 barring defendants from any further fill activities on the site until the matter could be heard.

The following constitutes this court's findings and fact and conclusion of law.

I. *FINDINGS OF FACT*

A. The Defendants and Their Relationship to the Diamond Beach Site

Robert Ciampitti is an individual residing within the District of New Jersey. (Robert Ciampitti Deposition (hereinafter R.C. Dep.), p.4; Tr. 3, p.24.) He and Pacific Four Corporation (hereinafter "Pacific Four"), a corporation organized and existing under the laws of Pennsylvania and doing business within the District of New Jersey, are the developers of the site. (R.C. Dep., pp. 11-13.)

Bruce Nicholas Ciampitti, Robert's brother and the largest single owner of parcels of land at the site, gave Robert a power of agency for all land at the site in the name of Bruce Nicholas. (R.C. Dep., pp. 59, 110; Tr. 3, pp. 60-61, 82.) (Bruce Ciampitti holds title to the land under the name Bruce Nicholas. R.C. Dep., p. 30.)

In addition, Robert Ciampitti was designated agent and representative for Pacific Four and all individual lot owners at the site to secure all necessary approvals to install improvements at the site. (R.C. Dep., pp. 12, 71, 74; Tr. 3, pp. 45, 80, 81.) Those individuals are paying Robert Ciampitti for his efforts on their behalf, (R.C. Dep., p. 76); and in some instances, Ciampitti has directed and paid for filling activities at the site himself, hoping later "to strike a deal" with the actual property owners. (R.C. Dep., p. 91; William Albrecht Deposition (hereinafter W.A. Dep.) pp. 19, 24.)

In light of Robert Ciampitti's activities at the site, the parties stipulated on the record that he is the principal defendant -- the one responsible for having conducted the activites at the site. (Tr. 1, p. 29.) For that reason, in the remainder of this opinion, the court shall refer only to the "defendants," when discussing activities at the site.

Albrecht and Heun Corporation is the construction company responsible for placing and grading fill on the site under the direction of Robert Ciampitti. (R.C. Dep., pp. 144, 151; W.A. Dep., pp. 19, 24.) Robert Ciampitti also contracted with Gerald E. Speitel Associates, a consulting engineering firm (hereinafter "Speitel"), to work for him. (Tr. 3, p. 137.)

B. Activities at the Site

As early as 1980, Robert Ciampitti was made aware of federal wetlands regulations by his consultants, Speitel. he was aware that in certain areas along navigable waterways, the U.S. Army Corps of Engineers (hereinafter "the Corps"), had jurisdiction over those areas through their regulations. (R.C. Dep., pp. 60-62; Tr. 1, pp. 103, 105; Tr. 3, pp. 100, 113-137, 160-161.)

Specifically, he was told by Speitel that there was possible state and federal jurisdiction over wetlands on the site. The Corps, which was summoned to the site by Gary Franklin, A Speitel employee, told Speitel that a federal permit to fill that area was unlikely. Despite those warnings, Ciampitti directed Speitel to develop engineering plans for the site and told Speitel that he would possibly be filling wetland areas. (Tr. 1, pp. 103-105; Tr. 3, pp. 100, 113, 137, 147-149, 160-161.)

Robert Ciampitti did nothing between 1980 and 1983 to contact the Corps about its jurisdiction over the site. He assumed that if the Corps had jurisdiction, it would so advise him. (R.C. Dep., pp. 72-73; Tr. 3, pp. 100-101.) Furthermore, he did not apply to the Corps for a wetlands permit, because in March 1983, he became aware of a 1907 land grant held by the previous owners of the site which provides:

> The bearers of the title of the property within this grant have the right to dredge, fill, reappropriate lands under water, construct wharfs, marinas, inlets, buildings, or anything that they deem appropriate to their private and exclusive use.

(R.C. Dep., pp. 102-103; Tr. 3, pp. 76, 153; Defendant's Trial Exhibit 14.)

In the summer of 1983, *after learning of this grant*, defendant decided to develop portions of the site which he was aware were designated as New Jersey wetlands and possible federal wetlands, believing that the grant gave him authority to do so. (R.C. Dep., p. 128; Tr. 3, pp. 97, 153.) In particular, he had a fifty foot pipe and a tide gate placed on the northwest corner of the site in order to keep debris from coming in and going out; to allow storm water to run off the site; and *to prevent tidal water from coming onto the site.* (R.C. Dep., pp. 115-118; Tr. 3, p. 102.)

These activities were noted by Robert E. Eckhardt from the Corps' Philadelphia District, Regulatory Branch for the Surveillance and Inspection Section, who inspected the site on September 2, 1983. (R.C. Dep., p. 138; Robert Eckhardt Affidavit (hereinafter R.E. Aff.) p. 7; Tr. 1, p. 35.)

He observed the following:

a. Approximately 3,000 feet of roadway had been constructed in areas he believed to be wetlands contiguous to Jarvis Sound on the site.

b. The roads were constructed of sand hauled to the site.

c. The fill consisted of sand.

d. A tide gate had been constructed in a tidal creek and stopped tidal flow into large portions of the area designated as wetlands at the site.

e. The tide gate is a type that causes wetlands to be drained of water.

f. The "wetlands" impounded by the tide gate showed signs of deterioration; e.g., vegetation was becoming dry.

g. Storm sewers and outlets had been installed in certain portions of the roads.

h. There were no soil erosion control measures at the site.

(R.E. Aff., p. 9; Tr. 1, pp. 40-45, 49.)

The fill material and tidal gate were placed in federally designated wetlands as depicted on Government Trial Exhibit RR-1. (R.E. Aff., p. 10; John Olson Affidavit (hereinafter J.O. Aff.), p. 6-7; Tr. 1, pp. 38-49.)

Eckhardt told Ciampitti that the site contained tidal wetlands and directed Ciampitti to cease further fill activities in those areas. (R.C. Dep., p. 139; R.E. Aff., p. 14; Tr. 1, pp. 50-51.) Ciampitti told Eckhardt that he would stop the fill activity, (R.E. Aff., p. 15), but he did not stop because he did not believe he had been properly notified by an appropriate official of the Corps. (R.C. Dep., p. 144.)

On September 13, 1983, Eckhardt returned to the site and observed approximately three dump trucks and two bulldozers hauling and spreading fill material into the designated wetlands. (R.E. Aff. p. 18; Tr. 1, pp. 56-57.) Eckhardt advised the bulldozer operator to stop filling in wetlands. The operator, Mr. Albrecht, made a telephone call and said he would stop work. (R.E. Aff., p. 19; Tr. 1, pp. 57-58.)

On September 15, 1983, the District Engineer of the Corps issued a "cease and desist" letter directing Robert Ciampitti to stop fill activities in the wetlands and remove the tide gate. (R.E. Aff., p. 21; Tr. 1, p. 107.) On September 16, 1983, this "cease and desist" letter was delivered by Robert Eckhardt and John Olson of the Corps to the office of James Webb, Jr., Esquire, the attorney for Robert Ciampitti. On that date, John Olson advised Webb of the location of wetlands on the site and explained to him the scope and nature of the violations there. (R.E. Aff., p. 22; Tr. 1, pp. 60, 64, 111; Tr. 3, p. 104.) Robert Ciampitti became aware that the cease and desist letter had been issued against him for filling federal wetlands, and that the letter had been served upon James Webb, his attorney. (R.C. Dep., p. 146; Tr. 3, p. 104.) Nonetheless, he did not cease filling activities at the site. (Tr. 1, p. 72; Tr. 3, p. 1031.) He directed Albrecht and Heun to continue filling at the site. He did not contact the Corps and disregarded the cease and desist letter. (R.C. Dep., pp. 147-151; Tr. 3, pp. 103-106.)

On September 16, 1983, John M. Olson, Supervisory Biologist serving as the Acting Chief of the Application Section of the Philadelphia District of the Corps, inspected the site and observed that approximately five acres of earthen fill had been placed on wetlands and in tidal creeks at the site, and that a pipe with a tide gate had been installed in one tidal creek. (J.O. Aff., p. 6.) Olson determined during his September 16, 1983 inspection that wetlands were located on the site and based that conclusion on:

a. The presence of tidal creeks flowing into the site;

b. The presence of existing vegetation adapted for growth in saturated or inundated soils, including saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow cordgrass (*S. patens*), salt grass (*Distichlis spicata*), black grass (*Juncus gerardii*), marsh elder (*Iva frutescens*), sea lavender (*Limonium carolinianum*) and salt wort (*Salicornia sp.*);

c. Saturated soil conditions; and

d. The presence of standing water over portions of the site.

(J.O. Aff., p. 7.)

He returned to the site on September 20, 1983 and observed bulldozers working on upland areas adjacent to the wetlands. He told the bulldozer operator which areas were wetlands and could not be filled, and which areas were uplands. (J.O. Aff., p. 14.)

On September 27, 1983, Robert Eckhardt received a phone call from James Webb, attorney for Roberty Ciampitti, who advised Eckhardt that no one from the Corps would be permitted on the site from that date onward. Webb also stated that the Corps could not stake out the wetlands on the site the following day, as had been previously agreed to by John Olson and James Webb, Esquire. (R.E. Aff., p 24; Tr. 1, p. 120; R.C. Dep., p. 158.)

On October 13, 1983, Robert Eckhardt returned to the site and observed that, since his last visit to the site, additional fill material had been placed in the wetlands as depicted on Government Trial Exhibit RR-3. He also observed a bulldozer spreading fill on one of the roadways which had previously been constructed in the wetlands. (J.O. Aff., p. 25; Tr. 1, p. 70.) *See* GRR-3.

On October 20, 1983, Robert Eckhardt returned to the site and observed that, since his last visit to the site, fill material had been placed in additional areas of the wetlands as depicted on Government Trial Exhibit RR-4. he also observed a tractor-trailer dump truck discharging fill in the wetlands. (R.E. Aff., p. 28; Tr. 1, p. 72.) *See* GRR-4.

C. The Site and Its Development

The portion of the Diamond Beach site involved in this controversy is described in Lower Township tax records simply enough as Blocks 696, 701, 706, 716, 721, 726 and 731. (Complaint p. 19; R.E. Aff., p. 12; J.O. Aff., p. 16; R.C. Dep., pp. 12, 71, 74; Tr. 3, p. 23.) It is a tract of land located along New Jersey Avenue, which is known as Park Boulevard in Lower Township (Tr. 2, p. 105), between West Jefferson Avenue and Madison Avenue. (Tr. 1, p. 39.) It is bounded on the West by East Railroad Avenue and Jarvis Sound.

A railroad embankment is located on the site parallel to East Railroad Avenue. (Tr. 1, pp. 45-56.) It was built in approximately 1924. (Tr. 3, pp. 113-114.) In a 1957 photo of the site, (D-1), remnants of a road running next to the railroad right-of-way can be seen. (Tr. 3, pp. 123, 67.)

Sometime prior to 1955, the southern portion of the site was used as a dumping ground. (Tr. 3, pp. 39-40.) As of 1957, mosquito ditches appeared on the property. (Tr. 3, p. 125.) Sometime between 1957 and 1962, a driving range was constructed on the site which was no longer in use as of 1969. The vegetation has grown back. (Tr. 3, pp. 126-127.)

Furthermore, the railroad was no longer used as of 1962. (Tr. 3.) Sometime between 1962 and 1969, a breach appeared in the railroad embankment. It has not been firmly established whether the breach was created as a result of a major storm that occurred in 1962 or was manmade. (Tr. 1, p. 150; Tr. 3, pp. 117, 130.)

Most important, in 1975 the federal government claimed jurisdiction over the wetlands under the Clean Water Act. In 1979 or early 1980, subsequent to the federal claim of jurisdiction, Memphis, Rochester and Richmond Avenues, and part of Park Boulevard were filled. All the evidence of record indicates that at the time of this first fill activity by the defendant the site could be characterized as wetlands and was subject to tidal flow. (*See infra* at 8-9; Tr. 2, p. 19.)

Following that, in 1982, Albrecht, at Ciampitti's direction, filled Railroad, Raleigh, Madison, South Station and Austin Avenues. (2D, p. 20.) A water well was installed by the Wildwood Utilities Authority between South Station and Raleigh, east of Park. In addition, those areas depicted on Government Exhibit RR were filled, and the tidal gate was installed. (Tr. 3, p. 74.)

Defendant plans to develop the entire Diamond Beach site to include approximately 1,500 single family dwellings, 6-8 multi-unit dwellings, a motel facility and a shopping center. (R.C. Dep., p. 132; Tr. 3, p. 83.) To date, none of the defendants had either applied for or obtained a permit under the Clean Water Act, (R.E. Aff., p. 31; J.O. Aff., p. 15); the Rivers and Harbors Act (*id.*); or the Refuse Act (*id.*).

D. The Presence of Wetlands on the Site

On the basis of the evidence thus far presented to the court, it concludes that federally regulated wetlands exist on the Diamond Beach site as designated on Government Trial Exhibits RR-5 and 100-102. (*See* Tr. 1, p. 130; Tr. 2, p. 101.)[1]

1. Defendant has not evaluated the site using federal wetlands criteria so he is not in a position to directly challenge the federal designation. Nonetheless, his expert, Gary Franklin of Speitel, admitted that the area designated by the New Jersey Department of Environmental Protection Agency is in fact a salt water marsh. (Tr. 3, p. 186.) This area appears on the overlay Mr. Franklin produced for the court. It appears to be somewhat smaller than the federally designated wetlands area. *See* D-30.

Vegetation on the site which indicates a wetlands environment includes: marsh hay, salt marsh cordgrass, high tide bush, salt marsh fleabone, black grass and sea myrtle. (Tr. 1, p. 131; Tr. 2, p. 110; Government Trial Exhibit 8.) These plants are commonly found in New Jersey salt marshes, (Tr. 2, p. 109), and are adapted to an area subject to tidal flow. (Tr. 1, pp. 146-147.) Specifically, salt marsh grass and salt grass, two plants which survive frequent flooding, are found immediately adjacent to the tidal ditches on the site. Up from the tidal ditches, but still within the federally designated wetlands area, high tide bush, groundsel tree and sea myrtle, vegetation adapted for life in saturated soil, can be found. (Tr. 2, p. 17.)

No significant areas within the wetlands designated area do not include the species described above (Tr. 1, p. 131); and the federally designated wetlands area is dominated by these plants. (Tr. 1, p. 132; Tr. 3, pp. 162-163.) Furthermore, these species exist beyond even the federally designated wetlands line. (Tr. 1, p. 132.)

The salt marsh snail, a salt marsh invertebrate which lives only in wetlands, has been found on the site. (Tr. 2, p. 114.) Isopods, which are characteristic of salt marshes have also been found there. (Tr. 2, p. 114.) Fish were observed in the creek on the site (Tr. 2, p. 114); snowy egrets were observed feeding on the fish (Tr. 1, p. 123).

Great Blue Heron and the Clapper Rail (which typically nest in salt marshes and are found only in wetlands) have been observed on the site. (Tr. 2, p. 114.)

The soil in the federally designated wetlands at the site is saturated throughout, in most cases directly to the surface. (Tr. 1, pp. 132-133; Tr. 2, p. 112.) It is wet, very dark and primarily sand, which indicates an anaerobic condition. (Tr. 2, p. 134.)

At the upper edges of the federally designated wetlands boundary, the soils are also saturated and there is a high water table. (Tr. 2, p. 113.)

During normal high tide conditions, surface water covers a majority of the site: although there are areas on the site above the high tide line which are never covered by water, over 50% of the site was covered during an inspection on November 4, 1983, even with the fill present. (Tr. 1, p. 145.) It can presently be determined by examining breaches in the fill on the site and adjacent communities of the same elevation (Tr. 1, p. 154) that, without fill, tidal waters would normally flow onto the site through the entire southernmost portion and the break in the railroad embankment. (Tr. 1, pp. 141, 150-151, 154; Tr. 2, p. 24.)[2]

Finally, the Diamond Beach site was mapped as a *wetlands* area by the United States Fish and Wildlife Service on its National Wetlands Inventory between 1978 and 1980. On that map, the site was designated as a mixed emergent wetland with open water. (Tr. 2, pp. 119-121; Government Trial Exhibit QQ.)

There is inconclusive evidence that the site contains wetlands which are below the mean high tide line. Although Government expert Olson and defense expert Franklin both testified that some small portion of the site is below the mean high water line (Tr. 1, pp. 157-158; Tr. 3, p. 182), Government expert Tiner, whom the court found to be most knowledgeable in this area, refused to testify about that subject because he believed that the data necessary to make such a determination was not available. (Tr. 2, pp. 132-133.)

2. There is a major tidal creek which flows through the railroad embankment south of the site below the area of fill. (Tr. 1, pp. 151-152.) Also, according to defendants' expert, there is a tidal tributary to the southeast of the site which would allow salt water to enter the site (Tr. 3, pp. 170-171); a marsh system to the southeast which is a potential water source (Tr. 3, p. 172); and an inlet to the site from the east which connects the site to the ocean through the Cape May Canal (Tr. 3, p. 173).

E. The Importance of the Wetlands and the Damage Done Thereto by Defendants

Tidal wetlands are used as nursing and spawning areas for a variety of forage fish and sport and commercially important fish species. (Tr. 2, p. 11; J.O. Aff., p 12.)

When this site is open to tidal flow, the plant production is washed into the adjacent tidal waters where it becomes the primary food source for aquatic organisms. The organic detritus of the tidal marsh serves as the base for the estuarian web. (Tr. 2, p. 11; J.O. Aff., p 10.)

Wetlands, including this site, also act as water quality purification areas. They improve water quality by tapping run-off from adjacent developed areas (Tr. 2, p. 11; J.O. Aff., p 9), and they act as a buffer, shielding adjacent upland areas from storm actions. They then serve as a storage area for storm and flood waters. (Tr. 2, p. 11.)

Furthermore, wetlands, including this site, are important habitats for aquatic animals, as well as mammals and birds, including:

a. wintering, migatory and breeding waterfowl and other birds;

b. passerine bird species; and

c. fur-bearing mammals.

(Tr. 2, p. 11; J.O. Aff., p 11.)

Fill on this site eliminates wetlands and reduces their productive value. Normal tidal flow is prevented, and therefore nursery and spawning grounds for aquatic organismsare not created, and the exportation of food materials into adjacent waters cannot be realized. (Tr. 2, pp. 18, 46, 105.)

The fill on the site had damaged the underlying five acres of wetland habitat. The blockage of tidal flow is adversely affecting the approximately 19 acres of wetlands enclosed within the perimeter of the fill. (J.O. Aff., p 8.) Without tidal flow, vegetation on the site will change, and there will be an overall draining effect of the area. (Tr. 2, p. 147.) Furthermore, erosion at the site is already causing fill to wash into the surrounding marsh and adjacent tidal waters. (Tr. 1, p. 124; Tr. 2, p. 123.)

II. CONCLUSIONS OF LAW - THE PREREQUISITES FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION AGAINST THE DEFENDANTS HAVE BEEN MET

The traditional test for determining whether a preliminary injunction should issue has been stated in numerous cases from the Court of Appeals for the Third Circuit. In *In re Arthur Treacher's Franchise Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1980), the court stated it as follows:

> We have repeatedly held that for the District Court to grant a preliminary injunction the moving party must generally show (1) a reasonable probability of eventual success in the litigation, and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. Moreover, while the burden rests with the moving party to make these two requisite showings, the district court should take into account, when they are relevant (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975) (Citations omitted).

Delaware River Port Auth. v. Transamerican Trail Tr., Inc., 501 F.2d 917, 919-20 (3d Cir. 1974); *A.L.K. Corp. v. Columbia Pictures, Inc.*, 440 F.2d 761 (3d Cir. 1971); *Allis-Chalmers Mfg. Co. v. White Consolidated Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); *Nelson v. Miller*, 373 F.2d 474 (3d Cir. 1967).

This court must now determine whether the requirements of the test have been met in the present case.

A. Reasonable Probability of Evenutual Success in the Litigation

1. The Clean Water Act

The Clean Water Act prohibits the discharge of pollutants into the waters of the United States except in compliance with other sections of the Act. The provisions of 33 U.S.C. § 1344 regulate the discharge of fill material into those waters by requiring a discharger to obtain an appropriate permit from the Corps before commencing operations.

As the court found above, none of the defendants has applied for a permit. It is also clear that "fill" material, as that term is defined in the Act, is being discharged by defendants. *See* 323.2(K). Therefore, the issue to which the parties directed their energies is whether "waters of the United States" are involved.

The term "waters of the United States" specifically includes wetlands. The regulations implementing 33 U.S.C. § 1344 provide in pertinent part:

> The term 'waters of the United States'[3] means:
>
> ★ ★ ★
>
> (3) Tributaries to navigable waters of the United States, including adjacent wetlands .....
>
> ★ ★ ★
>
> (c) The term 'wetlands' means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

3. Although section 1344 refers to "navigable waters," that term is defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7) as "waters of the United States."

33 C.F.R. § 323.2.

These regulations were specifically adopted pursuant to court order in *Natural Resources Defense Council v. Calloway*, 392 F. Supp. 685 (D. D.C. 1975). The court there concluded that Congress intended the Clean Water Act to assert "federal jurisdiction over the Nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution," and that the term "navigable waters" was not limited to the traditional tests of navigability. 1392 F. Supp. at 686. *See PFZ Properties, Inc. v. Train*, 393 F. Supp. 1370, 1381 (D. D.C. 1975).

This standard of jurisdiction has been continually repeated in recent cases. *See United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Lambert*, 695 F.2d 536, 537, 538 (11th Cir. 1983); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979); *Leslie Salt Company v. Frochike*, 578 F.2d 742, 754-55 (9th Cir. 1978); *United States v. Ashland Oil and Transportation Company*, 504 F.2d 1317, 1324-25 (6th Cir. 1974).

The Government presented strong evidence demonstrating that the land in question presently retains and, at the time it was filled by defendants, retained all the essential characteristics of "wetlands" as they are described under the Act, i.e., it was inundated and/or saturated by water at a frequency and duration sufficient to support vegetation that typically thrives in saturated soil conditions.[4] *See* the court's Findings of Fact.

4. Defendants challenged the criteria by which the Government would have the court decide this issue contending that in the absence of salinity tests a wetlands determination cannot be made. The court disagrees. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (three-prong test which includes type of soil, degree and frequency of inundation and saturation, type of vegetation); *Bayou Des Familles Dev. v. U.S. Corps of Engineers*, 541 F. Supp. 1025 (E.D. La. 1982); and *United States v. Weismann*, 489 F. Supp. 1331, 1339 (M.D. Fla. 1980).

The Government has proven through two expert witnesses that the site which has been designated as federally regulated wetlands has an abundance of "obligate hydrophytes" (plants requiring a saturated environment to survive), a number of which even live beyond the designated wetlands line. The site has been proven to contain saturated soils with regular inundation. The soils were found to show evidence of an anaerobic condition, suggesting frequent water coverage. The tidal flow was graphically depicted through ground and aerial photographs showing water-filled tidal ditches and tidal creeks. Testimony from both the Government and the defendants' expert proved the movement of tidal flow from the west, south and east onto the site.

Under the circumstances, the Government's likelihood of success on the merits is strong. In fact the Government has succeeded on the merits, subject, of course, to the court being persuaded otherwise by RELEVANT controverting evidence which has not already been presented but which defendants may present at the permanent injunction hearing.

The defendants have argued and continue to urge upon the court the importance of the history and development of the site to determine whether the Corps has jurisdiction over the property. Although the court is as fascinated by the history of the site as defendants' expert Mr. Franklin is, it agrees with Mr. Franklin that for purposes of the present controversy that history is of purely scientific value and is not dispositive of the legal issues before the court. (Tr. 3, pp. 165-166.)

Defendants' arguments on this point are not clearly delineated. The court perceives that defendants are making the following three arguments and will treat with them accordingly:

1. The Government would be violating the defendants' Fifth Amendment rights if it required them to remove the fill;

2. The site is not a natural wetland; i.e., it was not always a wetland, so the defendants should not be penalized for the fact that it has become one; and

3. The area became subject to tidal flow because of a manmade breach in the railroad embankment, and, therefore, it is not properly characterized as federal wetlands.

Defendants' first argument, which is derivatively based on *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), is without merit under the circumstances of this case. So long as nothing that occurred on or to the property, before that time in 1975 when the Corps claimed jurisdiction over the wetlands, destroyed the "wetland" character of the site, there is no justification for preventing the Corps from requiring the defendant to comply with the appropriate regulations on the basis of some violations of the Fifth Amendment due process or taking clause. Neither the dump's nor the driving range's presence, nor any other activity, transformed the land into irrevocably "dry land" in 1975. Therefore, this situation can be easily distinguished from the situation in *Stoeco Homes*.

Stoeco involved the Rivers and Harbors Act. In 1970, the Government's permit policy with respect to § 10 was changed. Previously, it had not required dredge and fill permits for work shoreward of the established legal harbor lines. The new policy required permits for such work.

Defendants had acquired a tract of land in 1951. The site had been a tidal marsh in 1927 when it was filled to a level substantially above mean high tide. *Stoeco Homes*, 498 at 610. At the time it was filled, the policy of the Secretary of the Army was not to require a permit because the site lay shoreward of the established legal harbor lines. Therefore, at the time the filling occurred, it was legal.

The court found that the Government had given its blanket consent to encroachments on the federal navigational servitude shoreward of established legal harbor lines; and that "when Stoeco purchased in 1951 what then had been *fast land* for twenty-four years, the navigational servitude had long since been surrendered." Accordingly, defendants were not required to remove the 1927 fill. Such forced removal would have raised Fifth Amendment due process and taking clauses issues.

> The court noted in concluding its opinion:
> (T)he holding is limited, of course, to tidal marshlands which had become fast land prior to the change in policy of the Army Corps of Engineers. Any work undertaken in estuarine areas which were subject to the ebb and flow of the tide when the Army Corps of Engineers published its new regulations asserting the navigational servitude to its full extent, are, under the terms of these regualtions, now subject to the § 10 permit requirement.

33 C.F.R. § 209.150(b). *Id.* at 611. The court's reasoning applies equally well to the regulations under the Clean Water Act as applied to the site. The Diamond Beach site was not fast in 1975 when the Corps published its new regulations in July of that year asserting the navigational servitude to encompass adjacent wetlands:[5] there is nothing in the record which indicates that the sources of ground water and tidal flow which saturate the site were not available in 1975, nor that the site was fast land at that time. (*See* aerial photographs of the site, the New Jersey Department of Environmental Protection designation, on the National Wetlands Inventory Map, Tr. 2, P. 19.) Therefore, when the defendants began the fill operations in 1983, they were subject to the permit requirements of § 1344.

5. § 323.3 Discharges requiring permits.

(a) General. Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in §§ 323.4-1, 323.4-2 and 323.4-3 are permitted by this regulation. If a discharge of dredged or fill material is not permitted by this regulation, an individual or general Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States in accordance with the following phased schedule:

(1) Before July 25, 1975, discharges into navigable waters of the United States.

(2) After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands.

(3) After September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes greater than 5 acres in surface area. (*See also* § 323.4-2 for discharges that are permitted by this regulation.)

(4) After July 1, 1977, discharges into all waters of the United States. (*See also* § 323.4-2 for discharges that are permitted by this regulation.)

An offshoot of defendants' first "development and history" argument is the argument that because of the railroad embankment to the west of the site, which served as a barrier for some period of time, the site was not always naturally flowed by the tide. From this they would presumably have the court conclude that the site does not fall within the Corps' jurisdiction.

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§ 323.4-1 Discharges prior to effective dates of phasing.

(a) Discharges of dredged or fill material in waters of the United States that occur before the phase-in dates specified in § 323.3(a) (2) through (4) of this part are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) of this section are met.

(b) Discharges of dredged or fill material of less than 500 cubic yards into waters other than navigable waters of the United States (*see* 33 CFR Part 329) that are part of an activity that was commenced before July 25, 2975, that were completed by January 25, 1976, and that involve a single and complete project and not a number of projects associated with a complete development plan are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) of this section are met. The term "commenced" as used herein shall be satisfied if there has been, before July 25, 1975, some discharge of dredged or fill material as a part of the above activity or an entering into of a written contractual obligation to have the dredged or fill material discharged at a designated disposal site by a contractor.

(c) For the purposes of Section 404, the following conditions must have been satisfied for the discharges occurring before the dates specified in paragraphs (a) and (b) of this section:

(1) That the discharge was not located in the proximity of a public water intake;

(2) That the discharge did not contain unacceptable levels of pathogenic organisms in areas used for recreation involving physical contact with the water;

(3) That the discharge did not destroy or endanger the critical habitat or a threatened or endangered species, as identified under the Endangered Species Act.

Both § 323.2 and § 323.4-1 have since been modified to exclude the phase-in provisions. *See* 47 FR 31810, 7/22/82.

First of all, as the court has just concluded, the history of the site is not relevant unless it indicates that the land was fast at the time the Corps claimed jurisdiction. As long as it was wet when the Corps extended its jurisdiction and when the fill activity began, the history of the site is irrelevant. *See United States v. Bradshaw*, 541 F. Supp. 881, 883 (D. Md. 1981) (only pertinent question is whether land was wetlands when filling activity took place.)

Secondly, the existence of an artificial barrier, in this case a railroad embankment, which may prevent tidal flow to a site is not determinative of the limits of Corps' jurisdiction. Wetlands separated from other waters of the United States by manmade dikes or barriers, natural river burns, beach dunes and the like are specifically defined as adjacent wetlands, 33 CFR § 323.2(d), therefore making them "waters of the United States" for regulatory purposes. 33 CFR § 323.2(a) (7). *See United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983) (even without direct or indirect surface connection between wetlands in question and adjacent river, area came under wetlands definition).

So even without the ingress and egress of tidal waters, the site could be classified as an adjacent wetlands area subject to Corps regulations. But here, the artificial barrier was breached -- sometime between 1962 and 1969 -- and thus did not serve as a barrier to tidal flow until defendants installed the tidal gate. At least since that time, a thriving wetlands environment has been established. Furthermore, tidal waters flow onto the site from the southeast where no barrier exists,[6] and groundwaters saturate the soil.

6. Defendants argue that their fill activities are exempt from Corps permit requirements under 33 CFR 323.4-2 which, when in effect, exempted certain discharges into *non-tidal* streams and their impoundments, including adjacent wetlands that are located above the headwaters. First of all, § 323.4-2 is no longer in effect and was not in effect at the time defendants initiated the impermissable activity. More important, *tidal* waters are involved in this matter.

Finally, with regard to defendants' third historical argument, the fact that part of the area *may* have become wetlands because of a *manmade* connection between the site and tidal waterways is not dispositive of the Corps' jurisdiction. This court finds that federal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be wetlands.

The Act applies to wetlands without reference to the manner by which they came to be in that condition. *See* 33 CFR § 323.2. Furthermore, since Congress intended to exercise its jurisdiction under the Clean Water Act to the greatest extent possible inorder to protect our environment, the court has no reason to believe that Congress did not intend to reach wetlands which are the habitats of fish, fowl and vegetation alike simply because those environments were, at some point in time, encouraged by human conduct.

More specifically, it was noted in the Federal Register, V. 42, No. 138, p. 37128 (1977), on the occasion of a modification of the definition of wetlands in 323.2:

> The words 'those areas that are periodically inundated' which appeared in the 1975 definition of 'wetland' were eliminated in the 1977 definiton because the legislative intent under Section 404 (33 U.S.C. § 1344) is to regulate discharges of dredged or fill material into the aquatic system *as it exists, and not as it may have existed over a period of time.*

(Emphasis added.)

Although there are no cases of which the court is aware dealing with this issue under the Clean Water Act, there are cases on point under the Rivers and Harbors Act. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979) *United States v. DeFelice*, 641 F.2d 1169, 1172 (5th Cir. 1981) (federal jurisdiction occurred by operation of law when an artificially created canal became connected to a tidal waterway); *United States v. Stoeco Homes, Inc.*, 498 F.2d at 611 (once artificial canals are connected to a tidal water body, they become navigable waters of the United States by operation of law).

While the court recognizes that a regulation under the Rivers and Harbors Act provides that "(n)avigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation," 33 CFR § 329.8,[7] the court does not believe that the existence of this regulation was determinative of the courts' decisions. And they stand for the proposition that the Government is not exceeding its power under the Commerce Clause by regulating "artificially" created navigable waters.

7. § 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) Existing improvements: artificial waterbodies. (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning areas. (*See* § 329.12(b) of this Part.)

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

That estuarine system which has developed on the Diamond Beach site is no less entitled to protection and is no less valuable to our society now that it has developed than any other wetlands site.

In addition to arguing the history and development of the site, defendants maintain that neither the Corps nor the New Jersey Department of Environmental Protection has jurisdiction over the Diamond Beach site because of a 1907 riparian grant covering the site which allows the defendants to do whatever they want with the property, including filling it, regardless of superseding federal and state statutes and regulations contrary to the grant's provisions.

It is not clear to the court what significance the defendants attach to the 1907 grant. If he is arguing that the grant's mere existence somehow supports his contention that the site was never considered to be "wetlands," the court rejects it. The fact that the State of New Jersey in 1907 did not recognize the importance of protecting vitally important estuarine areas and allowed for the dredging and filling of such sites has no relationship whatsoever to whether those areas are or are not "wetlands" under a federal act.

Furthermore, if the defendants are making the equally groundless argument that the grant *prevents* the federal government from asserting jurisdiction over the site under the Clean Water Act, the court also rejects it.

The defendants argue in a conclusory fashion that the 1907 grant vests *absolute* property rights in the grantee and his successors. If defendants mean to argue by this that the Government may not "take" the property, their argument is premature. As defendant Ciampitti has not applied for a permit and, consequently, has not been refused a permit, no taking without just compensation claim is presently cognizable: there has been no determination that the property may not be put to the uses desired. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 927 (5th Cir. 1983).[8]

If the defendants are arguing that the federal government may not *regulate* navigable waters of the United States under the Clean Water Act because of the 1907 New Jersey grant, they are either laboring under a serious misapprehension or disregarding very basic tenets of the United States Constitution. When a valid act of Congress is in conflict with state law, state action must give way to the federal legislation. "So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action . . . flow directly from the substantive source of the congressional action coupled with the supremacy clause of Article VI . . . ." L. Tribe, *American Constitutional Law*, 376 (1978). *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *United States v. DeFelice*, 641 F.2d 1169 (5th Cir. 1981).

8. With regard to the Government's power to take the property, *see Montana v. United States*, 450 U.S. 554, 551 (1981), *rehearing denied*, 452 U.S. 911, *on remand*, 657 F.2d 244, *appeal after remand*, 686 F.2d 766. "The navigation servitude, which is a term used to describe the *paramount interest* of the United States in . . . the navigable waters of the nation, derives from the Commerce Clause . . . ." *United States v. Certain Parcels of Lane Situated in City of Valdez*, 666 F.2d 1236, 1238 (9th Cir. 1982). "Once Congress determines that an action will improve or protect navigation, the Government may rely on the navigation servitude to accomplish that action. *Id.* at 1239 (citation omitted). *But see Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The court need not address at this time whether the property falls within the navigational servitude for taking clause purposes.

Defendant's final assault on the Government's claim to jurisdiction over the site is based on the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.* (hereinafter the "Management Act"). The defendant misunderstands the Act. Specifically, they argue that the Corps' claim under § 404 must fail because the Government has not introduced any evidence establishing that defendant has not complied with state law under the Coastal Zone Management Act, or that the Corps' requirements are no more strict than state requirements.

The Coastal Zone Management Act requires that federal exercises of jurisdiction over certain projects within a state's coastal zone must, to the fullest extent possible, be consistent with and approved state Coastal Zone Management program. 16 U.S.C. § 1456(c) (1). The defendants claim in essence that the Coastal Area Facility Review Act (hereinafter "CAFRA"), N.J.S.A. 13:19-1 *et seq.*, which is an approved program under the federal Management Act, preempts the federal government's jurisdiction in this case. There is nothing in the Management Act or in *Cape May Green, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983), upon which defendants rely, which supports his theory of preemption.

A regulation promulgated by the National Oceanic and Atmospheric Administration, the federal agency charged with administering the Management Act, provide:

> When federal agency standards are more restrictive than standards or requirements contained in the state's management program, the federal agency may continue to apply its stricter standards (e.g., restrict project development or design alternatives notwithstanding permissive management program policies) . . . .

15 CFR § 930.39(d) (1982).

Furthermore, 16 U.S.C. § 1456(f) provides that nothing in the Management Act shall in any way affect any requirement established by the Federal Water Pollution Control Act (also known as the Clean Water Act), and that such requirements shall be incorrporated in any program developed pursuant to the Management Act. Accordingly, CAFRA incorporates the Clean Water Act requirements to be stricter than those contained in CAFRA.

More important than all of this is the fact that the Management Act does not apply to this controversy, and, therefore, any question of consistency between the federal and state action does not arise. As the Government so aptly argues:

> Section 307(c) of the CZMA is directed at three different types of activites: (1) activities conducted or supported by the Government, (2) development projects of the Government, and (3) activities by private parties authorized by a federal permit. 18 U.S.C. § 1456(c). "The first two paragraphs thus reach activities in which the federal agency is itself the principal actor, the third reaches the federally approved activities of third parties." *Secretary of the Interior v. California, supra*, at 667. It is obvious that the filing of an injunctive suit by the United States does not fall within any of the categories.* Rather, in the case at hand, the activity in the coastal zone is purely a private activity of defendant Robert Ciampitti. The present case simply does not involve federal activity at this time since the defendant has not yet applied for a federal wetlands permit. If the defendant were to apply for a permit, then the question of whether Section 307(c) (3) of the CZMA applies would arise. Because defendant has failed to comply withthe permitting requirement of the Clean Water Act, that question is premature. For this reason, Section 307(c) of the CZMA does not apply and no consistency determination is required.
>
> * Even under the National Enviromental Policy Act, 42 U.S.C. § 4371 *et seq.*, an environmental review statute of greater scope and application than the CZMA, civil enforcement action, such as the present case, do not constitute federal actions. *See* 40 CFR § 1508.18(a).

The *Cape May-Greene* case upon which defendant so heavily relies is inapposite because there the federal government was attempting to prevent development on a flood plain by placing a condition on a federal sewer grant for an area that had already been specifically approved for development by the state. *Id.* at 182. Just as clearly as the Act does not apply to the present situation, it applied to that situation.[9]

The fact that defendant Ciampitti has applied for and received some local permits is irrelevant.[10] Defendant continually refers to state approvals which he has received, but there is no evidence of them in the record; and defendant totally ignores the fact, for purposes of this argument, that large portions of the site were designated wetlands on the New Jersey Department of Environmental Protection's map and therefore could not be filled without state approval but were nonetheless filled without that approval.

Finally, the court finds the Supreme Court's recent decision in *Secretary of the Interior v. California*, 104 S. Ct. 656 (1984), upon which defendants also rely, irrelevant to the issues before this court.

The court having found no merit to defendants' challenges to the Corps' jurisdiction under the Clean Water Act, it can only conclude the Government's high probability of success.

9. The Government also maintains and the defendant admitted (Tr. 3, pp. 85-86) that CAFRA does not apply to this site. It applies to development of public facilities; including housing developments of the 25 or more lots, and there are 24 individual lot owners involved here.

10. According to the defendant, he has received approval for a permit for soil and erosion control on portions of Richmond, Rochester and Memphis Avenues from the Cape May County Soil and Conservation District. (D-16; Tr. 3, p. 71.) He has been given permission by the Township of Lower to construct streets, sidewalks, curbs and sewer pipes along those avenues, and his waste water treatment capacity application has been approved by the Township.

2. The Rivers and Harbors Act and the Refuse Act

Given the evidence of record to date, it appears that the Government has the broadest jurisdiction over the site under the Clean Water Act.[11] Since the Court has determined that the Government is likely to succeed on the merits of its claim under that Act, the Corps' possible jurisdiction under the Rivers and Harbors Act and the Refuse Act is not determinative of whether a preliminary injuction should issue and need not be considered at this time.

B. Irreparable Injury

It is clear that the Government need not make a showing of "irreparable injury" in order to qualify for an injunction under the Rivers and Harbors Act. *Stoeco Homes*, 498 F.2d at 611. It is equally clear that such a showing is required under the Refuse Act. *Id.*

11. Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, requires a permit from the Corps for dredge and fill activities which alter "the location, course, condition, or capacity . . . of any of the navigable waters of the United States." For purposes of this Act, "navigable water of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. 33 CFR § 322.2. Those marsh areas which are covered by waters of a navigable water, here Jarvis Sound, at mean high tide are navigable waters of the United States even though they are not navigable in fact. *United States v. Cannon*, 363 F. Supp. 1045, 1050 (D. Del. 1973); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610 (3d Cir.), *cert. denied*, 420 U.S. 927 (1974). The evidence presented to the court regarding those portions of the site below the mean high tide line would at best support a finding that small areas fall below that line.

Under the Refuse Act, federal jurisdiction is, at a minimum, commensurate with jurisdiction under the Rivers and Harbors Act. *Stoeco Homes*, 498 F.2d at 611. And it has even been extended to non-navigable waters where refuse deposited in those waters will in turn wash into navigable waters. *See United States v. Esso Std. Oil Co.*, 375 F.2d 621, 623 (3d Cir. 1973).

Nonetheless, this court is relying upon the Clean Water Act and is confronted with the issue of whether a showing of irreparable harm need be made under that statute.

There is no Court of Appeals for the Third Circuit case regarding the need for such a showing, and the parties implicitly invite the court to decide that issue. It is an invitiation the court declines.

It is clear that the Government has made a showing of irreparable injury whether or not such a showing is required.[12] *See* Findings of Fact, *infra*, at 10. And given that the spring thaw has begun, the damage will increase geometrically between the issuance of a preliminary injunction and a final hearing on the merits.

12. *In United States v. Lambert*, 695 F.2d 536 (11th Cir. 1983), the court held that a showing is necessary because of the drastic nature of the remedy. And in *United States v. Kentland-Elkhorn Coal Corp.*, 353 F. Supp. 451 (E.D. Ky. 1973), the court held that the Government had to make *some* showing of irreparable harm. (The court recognized however, that the burden is lessened where the public interest is at stake.) However, there is plenty of general support for the contrary position. A preliminary injunction based upon the violation of a statue, *especially one which makes specific provision for injunctive relief*, may issue upon a showing that the federal statute has been violated. *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944); *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 523-524 (3d Cir. 1963). Inherent in the statute itself is the legislative conclusion that violations of it cause irreparable injury to the public. *United States v. Ingersoll-Rand Co.*, 320 F.2d at 523-524; *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672, 678 (D. N.J. 1973), *aff'd in part*, 498 F.2d 597 (3d Cir.) *cert. denied*, 420 U.S. 927 (1974); *United States v. Nutrition Service, Inc.* 227 F. Supp. 375, 388-389 (W.D. Pa. 1964), *aff'd*, 347 F.2d (3d Cir. 1965). The *Stoeco Homes* case can be read to support this proposition. *See* 498 F.2d at 611.

The court should grant the equitable relief sought by the United States because there is no adequate remedy at law to compensate the public for the harm caused by the disposal of fill material into tidal wetlands. Tidal marshes serve a variety of critical functions, including the storage of flood waters, nutrition for the estuarine food web, habitat for wildlife, nursery and feeding grounds for fish, and filtration of water run-off and tidal water. Only if the filling is immediately enjoyed will the United States have the continuing benefit of these ecologically valuable lands.

C. The Possibility of Harm to Other Interested Persons

Another factor weighed by the courts in ruling on requests for temporary and preliminary injunctive relief is the injury to the defendant or other interested parties if an injunction issues. In the present context, the only foreseeable injury to the defendant is economic loss. Even that would be minimal as this preliminary injunction would merely restrain defendants from further filling activities and require them to remove the tidal gate. This would allow the tidal waters to return until the issues in this matter can be finally decided. The defendant is free to fill and develop properties which are not in this wetland area.

In fact, the economic loss to the defendant from cessation of such activities is far outweighed by the benefit to the community from the enjoining of activities adversely affecting the environment. Moreover, any economic burden placed upon defendant by the injunctive relief sought in this case must be balanced against the significant benefits that will accrue to the public-at-large from abatement of the filling operation.

D. The Public Interest

Finally, in situations involving the Government, courts must determine whether the issuance of an injunction would further the public interest. In this context, the United States Supreme Court has noted that courts of equity "go much farther both to give and withhold relief in furtherance of the public interest . . . when only private interests are involved." *Virginia Railway Co. v. System Federal No. 40,* 300 U.S. 515, 552 (1937); *see Yakus v. United States,* 321 U.S. 414, 440-41 (1944).

It is axiomatic that the public interest under the Clean Water Act requires strict enforcement of the statute so as to clean up the nation's waters and preserve the surrounding ecological environment. *See, e.g.,* 33 U.S.C. § 1251; *Train v. City of New York,* 420 U.S. 35 (1975).

Having fully examined the record in this case in terms of the criteria for granting a preliminary injunction, the court is convinced that a preliminary injunction must issue, and that the hearing to determine the Government's right to permanent relief must be expedited. At that hearing, the parties are entitled to present any relevant, new factual evidence or relevant legal arguments which the court has not yet considered.

The foregoing constitutes this court's Findings of Fact and Conclusions of Law, pursuant to F.R.C.P. 52(a).

The accompanying order will be entered.

ie pg 25a

/s/ John F. Gerry
JOHN F. GERRY, U.S.D.J.

DATED: April 2, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT CIAMPITTI, ALBRECHT AND HEUN CORPORATION, BRUCE N. CIAMPITTI and PACIFIC FOUR CORPORATION,

Defendants.

This matter having come before the court on the Government's request for preliminary and permanent relief; and

The court having carefully considered the record and the parties' proposed findings of fact and conclusions of law, and for good cause shown;

It is this 2nd day of April, 1984, hereby ORDERED that defendants are preliminarily restrained and enjoined from allowing, suffering or causing the discharge of any pollutants or fill material (including sand, gravel, rocks, dirt, wood and concrete) from their properties located along Park Boulevard between West Jefferson Avenue and Madison Avenue and bounded on the west by Jarvis Sound in Lower Township, Cape May County, New Jersey (more particularly described in Lower Township tax records as Blocks 696, 701, 706, 716, 721, 726 and 731) into the waters of the United States which are adjacent thereto or into portions of the site designated as wetlands on Government Trial Exhibit RR-5, and more particularly described in Government Exhibits 100-102; and

Furthermore, it is ORDERED that the tidal gate be removed and that appropriate restraints be placed on the fill to prevent it from washing into surrounding wetlands; and

It is FURTHER ORDERED that all parties appear on the 17th day of April, 1984, at 9:30 A.M., for the final hearing in this matter.

i.e. pg 25a

/s/ John F. Gerry
JOHN F. GERRY, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT C. CIAMPITTI, ALBRECHT AND HEUN CORPORATION, BRUCE N. CIAMPITTI and PACIFIC FOUR CORPORATION,

Defendants.

APPEARANCES:

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Attorney for Defendant Robert C. Ciampitti, Bruce N. Ciampitti and Pacific Four Corporation

GERRY, District Judge

1. INTRODUCTION

This matter is before the court on the Government's request for a permanent injunction restraining the defendants from engaging in fill activities at the Diamond Beachsite in Cape May County, New Jersey. Also at issue is the question of whether the defendants will be required to remove the fill already placed by them on the site, and whether they will be required to restore the site to its conditon prior to the inception of fill activities. Finally, the court must decide whether the imposition of civil penalties against defendants is appropriate.

The Government has proceeded under the Federal Water Pollution Control Act (Clean Water Act), the Rivers and Harbors Act, and the Refuse Act. On October 24, 1983, this court issued a temporary restraining order barring any further fill activities by defendants until the matter could be heard. A hearing on the issuance of a preliminary injunction was held November 9, 15 and 17, 1983.

By opinion dated April 2, 1984, the court issued a preliminary injunction preventing any further fill activities. *U.S. v. Ciampitti,* 583 F. Supp. 483. In that opinion, the court held that the Government had succeeded on the merits of its case under the Clean Water Act, the proofs having established that the site in question constituted wetlands, and that the defendants had discharged fill material without obtaining the required permit. All the requirements for issuance of a preliminary injunction were met. *See In re Arthur Treacher's Franchise Litigation,* 689 F.2d 1137, 1143 (3d Cir. 1980). The defendants were invited to present "RELEVANT" evidence at a permanent injunction hearing to controvert the prior evidence on which basis we ruled that the Government had succeeded on the merits.

As to the Rivers and Harbors Act and the Refuse Act, this court held that the evidence was inconclusive as to whether any portion of the site fell below the mean high water mark and, therefore, within the jurisdiction of the Army Corps of Engineers such that a permit was necessary before fill activities could occur. The preliminary injunction, therefore, was not issued on the basis of these two Acts. However, it was clear from the evidence that the Government had the broadest jurisdiction over the site under the Clean Water Act. 583 F. Supp. at 497. That is to say, much larger areas of the site were wetlands than were arguably below the mean high water mark, and those areas arguably below the mean high water mark, were in any event encompassed by the wetlands areas. Thus, success under the Rivers and Harbors Act and the Refuse Act was not crucial to the Government's application for a preliminary injunction.

A hearing on the issuance of a permanent injunction was held on May 21, June 6 and July 5, 1984.

The following shall constitute the court's findings of fact and conclusions of law.

2. FINDINGS OF FACT

A. The court adopts its previous findings and conclusions and incorporates them herein, with the following supplementations.

B. *Clean Water Act*

There has been no additional evidence submitted which alters the court's finding of jurisdiction under the Clean Water Act. That is, the court continues to hold that the site in question, as described in Governments Exhibits RR-5 and 100-102, contains wetlands.

C. *Rivers and Harbors Act/Refuse Act*

The Rivers and Harbors Act, 33 U.S.C. § 403, and the Refuse Act, 33 U.S.C. § 407, extend federal jurisdiction over and, to a certain extent, beyond, the "navigable waters of the United States." The term "navigable waters," for the purposes of these statutes, means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark. 33 C.F.R. § 322.2. Testimony was introduced at both the preliminary and permanent injunction hearings regarding the presence of territory on the site below the mean high water mark.

Of the 26.72 acres of land within the Diamond Beach site that are federal wetlands (*see* Government Exhibit 101, Government Exhibit 43), the Government claims that 1.45 acres, all within the area designated as wetlands, are below the mean high water line. (These 1.45 acres are colored in blue on Government Exhibit 101.)

Indisputably, *some* of these 1.45 acres are below the mean high water line. The defendants' witness, Gerald Speitel, conceded that some man-made ditches within the disputed area are below mean high water. Beyond these ditches, however, the evidence is less conclusive.

In order to establish the mean high water line for the Diamond Beach site, the Government's expert, Richard Rauch, had to extrapolate from tidal bench marks above and below the site, since no data was available regarding the site itself. Mr. Rauch obtained data from two tidal bench marks: Bench Mark 5838 E1977, located north of the Diamond Beach site in the vicinity of Sunset Lake, and Bench Mark 5901J, located south of the Diamond Beach site. These two bench marks were chosen because of their proximity to the site.

By using surveying methods, elevations were established for the two bench marks, and then the elevations of the tidal bench marks were related to elevations established at control points on the Diamond Beach site. Mr. Rauch determined the mean high water line on the site to approximate an elevation of 2.94 feet. However, in depicting the mean high water line on Exhibit 101, Mr. Rauch used an elevation of 3.0 feet.

Once the elevation for the site was established, the contours of the area below that elevation (3.0 feet) were made using the process of photogrammetry. This process involves the use of aerial photographs viewed through a stereoscope.

Although there was considerable testimony regarding the accuracy of the elevation established (2.94 feet) and the accuracy of the contours on the map of the site (Government Exhibit 101), this court is still not convinced that, apart from the man-made ditches, any of the land in question lies below the mean high water line. The problem, in the court's view, is with the methodology used to produce the data in question. The affidavit of defendants' expert, James P. Weidener, introduced as Defendants' Exhibit 46, concludes that the depiction of areas below the mean high water line is "flawed and subject to error." Mr. Weidener made, among others, the following criticisms of the Government's evidence. First, he stated, the tide bench marks used were not sufficiently close to the Diamond Beach site and, "more importantly," were in different bodies of water from the Diamond Beach site. Mr. Weidener stated that bench marks should have been established in Jarvis Sound, on which the property lies, because the elevations of mean high water from other bodies of water may not accurately reflect those at Jarvis Sound. Second, Mr. Weidener stated that the tidal datum epoch used in arriving at the mean high water lines for the sites north and south of the property was not the most current epoch for which data was available. The use slightly stale data, the court infers, could have affected the accuracy of the Government's evidence. Third, Mr. Weidener stated

that the use of photogrammetry in order to establish contour boundaries is inappropriate because of problems with accuracy. Finally, the court notes that the Government used a figure of 3.0 feet as the elevation for the mean high water line and made its maps in acordance with this elevation. The actual elevation the Government calculated was 2.94 feet. Although the difference is not great, the use of the 3.0 figure may nevertheless result in a finding that a larger area is below mean high water than is actually the case.

The court, based on the above criticisms of the Government's methodology, is unable to find that the Government has carried its burden with respect to the areas asserted to be below mean high water, *except for the man-made ditches,* about which there is no controversy. Somewhat less than 1.45 acres, therefore, is below the mean high water line, although, based on the Government's exhibits, the court is not in a position to state the precise location or area of these pieces of territory.

3. CONCLUSIONS OF LAW

A. *Clean Water Act - Injunctive Relief*

Having reaffirmed our finding of Corps jurisdiction under the Clean Water Act, and finding no reason to disturb our conclusions regarding the other requirements for injunctive relief, the court will permanently enjoin the discharge of fill material into the wetlands, as designated in Government Exhibits 101 and 43.

The court must briefly address the arguments raised by the defendants in opposition to this conclusion.

First, the defendants contend that, based on a recent case out of the Sixth Circuit, the court should reconsider its conclusion that the property in question contains wetlands.

In *U.S. v. Riverside Bayview Homes*, 729 F.2d 391 (6th Cir. 1984), the Sixth Circuit was faced with a case where, between the issuance and appeal of a permanent injunction, the Corps promulgated a new regulation changing the definition of "wetlands." The case was remanded for further proceedings in light of the new definition. 615 F.2d 1363 (6th Cir. 1980). On the second appeal, the issue was whether the district court on remand had properly interpreted the new definition to include the property of the defendants.

> The former definition of wetlands was as follows:
>
> those areas that are (1) periodically inundated and that (2) are normally characterized by the prevalance of vegetation that requires saturated soil conditions for growth and reproduction.

33 C.F.R. § 209.120(d) (2) (i) (h) (1976). This definiton was changed, according to the Corps, to eliminate several problems. The reference to "periodic inundation" was deleted because the Corps concluded that the Clean Water Act, § 404 (33 U.S.C. § 1344), was intended to regulate discharges into the aquatic system as *it exists*, not as it may have existed over a record period. 729 F.2d at 395. Furthermore, "normally" was replaced by the phrase "under normal circumstances do support." This change was adopted, in part, to make clearer that excluded from Corps jurisdiction are those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. *Id.* at 396, and also to make clearer that man-made obstructions to the flow of water, such as tidal gates (as are present here) would not exempt a site from Corps jurisdiction. *Id.* Thus, the new, and present, definition of wetlands is as follows:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

33 C.F.R. § 323.2(c) (1983).

In construing this newer definition, the *Riverside* court stated as follows:

> The new regulation makes clear that it is the present occurrence of inundation or flooding sufficient to support wetlands vegetation, *not the mere presence of such vegetation from some other cause*, that determines whether a particular area is wetland. . . . Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, *and the latter must be caused by the former.*
>
> *Were this no so, then areas which inexplicably support some species of aquatic vegetation, but which are not normally inundated, would fall within the wetlands definition. Such a perverse result could not have been what the Corps contemplated . . . . Indeed, as noted earlier, the Corps expressly adverted to the situation of "areas that are not aquatic but experience an abnormal presence of aquatic vegetation" and emphasized that such lands were not intended to be covered by the regulations.*

729 F.2d at 396 (emphasis added).

In holding that the lands in that case were not wetlands, the Riverside court noted that the lands, although arguably "periodically inundated" (in accordance with the previous wetlands definition), were not presently inundated. The presence of the vegetation was "abnormal," and attributable not to the few present instances of flooding, but to the type of soil on the property. *Id.* at 397.

This court has some reservations about the Sixth Circuit's construction of the regulation at issue, although it has no problem with that construction as applied to the facts of that case. We find, however, that the facts of the instant case clearly support Corps jurisdiction, even under the *Riverside* test. In our previous opinion, we found as follows:

> The soil in the federally designated wetlands at the site is saturated throughout, in most cases directly to the surface.
>
> . . . . .
>
> During normal high tide conditions, surface water covers a majority of the site . . . .

. . . .

> Vegetation on the site which indicates a wetlands environment includes: marsh hay, salt marsh cordgrass, high tide bush, salt marsh fleabone, black grass, and sea myrtle. These plants are commonly found in New Jersey salt marshes and are adapted to an area subject to tidal flow.

583 F. Supp. at 489. We further concluded:

> The Government has proven . . . that the site . . . has an abundance of . . . plants *requiring* a saturated environment to survive . . . .

Id. at 492 (emphasis added). This court believes that its findings indicate the presence of areas inundated by surface or ground water, the presence in those areas of a prevalence of vegetation typically adapted for life in saturated soil, and that such finding support the conclusion that the latter circumstance is caused by the former.

In considering "causation" under this regulation, this court does not believe the Sixth Circuit announced a test whereby it becomes necessary to rule out any and every possible cause for the existence of aquatic vegetation other than frequently saturated soil. This would be an impossible test, it would seem. Rather, this court believes the Sixth Circuit was speaking of causation in a somewhat looser sense, whereby by the presence of frequently saturated soil would ordinarily be taken as the "cause" of the vegetation, absent some peculiar circumstance indicating another cause.

In this case, the court has found the presence of both saturated soil and aquatic vegetation; and absent any evidence to indicate that, under the circumstances, the presence of the vegetation is, in some sense abnormal, the court concludes that the soil saturation "causes" the growth of the vegetation. This is not the "perverse" case to which the Sixth Circuit alludes wherein, even absent the regular presence of soild saturation, aquatic plants are nevertheless abundantly present.[1] In such a case it obviously becomes necessary to look for the explanation of the growth in other factors beside the presence of surface or ground water. Here, there is no need to look any further.

Accordingly, our finding of Corps jurisdiction is not disturbed by the *Riverside* decision.

The court further notes that the fact that we cannot quite conclude that much of the land is below mean high water does not indicate, as defendants argue, that it is not saturated by surface *or ground water*.

The defendants' second challenge to the issuance of a permanent injunction is one previously raised and disposed of, but which we will reiterate. This is the "taking" issue.

The defendants state that the assertion of Corps jurisdiction over the property combined with the injunction against further discharges onto the property, amounts to a taking for which compensation must be paid.

The first problem with this argument is that neither of the defendants *who have answered* the complaint (that is, neither Robert Ciampitti nor Albrecht and Heun) is, on the record, a property owner. These defendants, therefore, lack standing to even raise the issue. We only address the issue further because counsel for Robert Ciampitti entered an appearance for Bruce Nicholas Ciampitti and Pacific Four Corporation. Bruce Nicholas Ciampitti, at least, owns some of the property and has standing to raise the issue (although, to do so, he should have filed an answer and counterclaim). Whether a taking claim may even properly be brought in this court, however, is doubtful. If the taking claim exceeds $10,000, jurisdiction is exclusive in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491. *American Dredging Co. v. Dutchyshyn*, 480 F. Supp. 957 (E.D. Pa. 1979), *aff'd* 614 F.2d 769; *Bayou des Families Development Corp. v. U.S. Corps of Engineers*, 541 F. Supp. 1025 (E.D. La. 1982).

Furthermore, as this court stated in its previous opinion, the issue is, in any event, premature until a permit is applied for and denied. The defendants argue that, if applied for, a permit will most certainly be denied. However, any informal predictions by Corps personnel can hardly take the place of a formal denial following a formal submission in compliance with the applicaton requirements of 33 C.F.R. § 325. The fact remains that no permit application has yet been processed, and the taking issue is premature. *See Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 927 (5th Cir. 1983); *U.S. v. Byrd*, 609 F.2d 1204 (7th Cir. 1979).

The defendants have introduced letters (Defendants' Exhibit 32) which purport to demonstrate that the Corps has been unwilling to meet with them to discuss a possible permit application. It may well be that the Corps at this juncture will not talk to Mr. Ciampitti. *See* 33 C.F.R. § 326.3(c)(4) and footnote 2 (where Clean Water Act violation is of a nature that complaint is recommended to be filed by U.S. Attorney, after-the-fact permit application should not be accepted until the enforcement action is resolved). This fact still does not convert the Corps assertion of jurisdiction into a taking but further highlights the prematurity of the claim.

Finally, of course, we note that the mere assertion of jurisdiction and the injunction against filling may or may not ultimately, on the mertis, amount to a taking. *See, e.g., Deltona Corp. v. U.S.*, 657 F.2d 1184 (Ct. Cl. 1981); *Andrus v. Allard*, 444 U.S. 51 (1979).

In sum, then, the taking argument has no bearing on our conclusion in favor of an injuction. (Of course, the mere fact that property is "taken" only requires that compensation be paid; nothing *prevents* the Government from taking the property by preventing development.)

To repeat, then: the defendants are hereby permanently enjoined from engaging in fill activities on those portions of the site designated as wetlands.

C. *Rivers and Harbors Act/Refuse Act - Injunctive Relief*

Above, we found that the man-made ditches on the Diamond Beach site were below the mean high water line. Even though man-made, these ditches are nonetheless subject to Corps jurisdiction. *See* 33 C.F.R. § 329.8(a) (1) (determination of navigability not limited to natural or original condition of waterbody; a canal or other artificial water body that is subject to ebb and flow of the tide is a navigable water); *see also* 33 C.F.R. § 329.13(b). Therefore, as to these ditches, a permanent injuction against fill activities is warranted under either 33 U.S.C. § 403 or § 407. However, at this juncture, such an injunction is unnecessary, since the permanent injunction against filling the wetlands already encompasses any activities in these ditches. Moreover, the court at this time lacks a clear survey or metes and bounds description of the ditches such as would make it possible to appropriately fashion an injunctive order. Accordingly, no injunction specifically directed to the man-made ditches will issue at this time.

The Government has apprised the court of case law indicating that jurisdiction under these Acts may extend even beyond the mean high water line, where activities shoreward of the line may have an impact on navigable waters below the line. *See U.S. v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1297-99 (5th Cir. 1976); *U.S. v. Moretti*, 526 F.2d 1306, 1310 (5th Cir. 1976); *U.S. v. American Cyanamid Co.*, 480 F.2d 1132, 1135 (2d Cir. 1973); *U.S. v. Esso Standard Oil Co.*, 375 F.2d 621, 623 (3d Cir. 1967).

Thus, an injunction under these Acts to prohibit fill activities in close proximity to the ditches may be warranted, as fill placed on the banks of, or near, the ditches may erode into the ditches. However, for the reasons given above with respect to the ditches themselves, no injunction specifically directed to fill near the ditches will issue at this time. The injunction we issue with respect to the entire wetlands is sufficient to address the concerns of the Government under all the Acts under which suit was brought.

D. *Restoration Plan*

The Government seeks an order requiring the defendants to remove all fill placed within the wetlands area and to return the site to its natural state by planting wetlands vegetation and restoring waterways.

There can be no doubt that this court has the power under the Clean Water Act to order the restoration proposed by the Government. *See U.S. v. Robinson,* 570 F. Supp. 1156 (M.D. Fla. 1983); *U.S. v. Outboard Marine Corp.,* 549 F. Supp. 1036, 1043 (N.D. Ill. 1982); *U.S. v. Weisman,* 489 F. Supp 1331 (M.D. Fla. 1980); *O'Leary v. Moyer's Landfill,* 523 F. Supp. 642 (E.D. Pa. 1981).

The defendants argue, however, that the Government has failed to justify, either procedurally or substantively, its proposed plan. The defendants rely on *U.S. v. Sexton Cove Estates, Inc.,* 526 F.2d 1293, 1301 (5th Cir. 1976) and *Weisman, supra.* The *Weisman* court,expanding on the language in *Sexton Cove Estates,* stated:

> (T)here are two prerequisites to be satisfied before any consideration of the restoration plan itself: (1) the court must have jurisdiction over the portion of the property or activity to be directly affected by the restoration plan, and (2) the court must conduct a hearing in which the merits,demerits, and alternatives to the restoration plan are fully developed.

489 F. Supp. at 1342-43. Here, based on the above findings of fact and conclusions of law, there can be no doubt that this court has jurisdiction over the affected portion of the site. As to the hearing requirement, there is nothing in the case law to suggest that the hearing on the restoration plan be a hearing separate and apart from, or subsequent to, the hearing on the merits (the hearing to determine whether the Act was violated). In the *Weisman* case itself, no separate hearing took place. 489 F. Supp. at 1343. Therefore, this court finds nothing procedurally inappropriate about ordering restoration on the present record.

The *Weisman* court elaborated as well on the criteria to be applied in evaluating a proposed restoration plan.

> The selected plan must: (1) confer maximum environmental benefits, (2) be achievable as a practical matter, and (3) bear an equitable relationship to the degree and kind of wrong it is intended to remedy.

489 F. Supp. at 1343. The Government's proposed plan is actually merely a set of guidelines. The Government would have the defendants submit a more detailed plan, subject to approval or modification by the Corps of Engineers. Nevertheless, there is enough in these guidelines to permit this court to evaluate the plan's appropriateness.

These guidelines require: that all fill be removed and that the defendants identify the location where such removed fill will be taken; that the area be replanted with plant species found adjacent to the areas of fill removal; and that waterways be restored. Further, the Government would have the defendants submit an implementation schedule, prepare a post-restoration monitoring program, and have the defendants engage an outside consultant to actually prepare and implement the program.

In opposition to the Government's proposal, the defendants apparently take the position that there should be *no* restoration; that is, that the site should be left as it is. The defendants' position is based on rather vague allegations that restoration would have an adverse impact on the environment insofar as it would destabilize partially completed sewer and utility systems in the area and result in an economic loss to both public and private investors in these utility and sewer lines. The court has scrutinized the record in this case and finds little evidence to support these allegations, other than the evidence that the defendants themselves will suffer economic loss.

In evaluation whether a proposed restoration plan will confer maximum environmental benefits, it is necessary to consider the environmental importance of the wetlands on the site as well as the harm caused by the defendants' activities. Congress and the Corps of Enginners, through its regulatory authority, have taken the position that wetlands serve important environmental functions:

> Some wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest . . . .
>
> Wetlands considered to perform functions important to the public interest include: . . . wetlands which serve significant biological functions, including food chain production, general habit, and nesting, spawning, rearing and resting sites for aquatic or land species; . . . wetlands which are significant in shielding other areas from wave action, erosion, or storm damage; . . . wetlands which serve as valuable storage areas for storm and flood waters . . . and wetlands which serve significant and necessary water purification functions.

33 C.F.R. § 320.4(b). In the court's findings of fact in connection with the issuance of a preliminary injunction, we found that the wetlands on the Diamond Beach site perform all the vital functions enumerated above. 583 F. Supp. at 490. We further found that the ability of these wetlands to perform these vital functions was hindered by the defendants' activities. *Id.* It stands to reason that the return of the wetlands area to its undeveloped state would confer maximum environmental benefits. At best, the defendants' protestations to the contrary are speculative; and the only remedy they offer is that of doing nothing, which is unacceptable. *Cf. Weisman, supra,* at 1347.

In evaluating the practicality of a proposed restoration, we must consider its feasibility and cost-effectiveness. *Id.* at 1348. There is nothing in the record to suggest either that the fill could not be removed or that vegetation could not be replanted. Of course, whether the replanted vegetation will survive is uncertain. In other circumstances, however, this has not barred a proposed replanting. *See Weisman, supra,* at 1347 (restoration of forest ordered, although full recovery would take from 10 to 30 years). In considering cost-effectiveness, we realize that we lack some information that might be useful: the financial resources of the defendants and an estimate of the cost of the restoration plan. *Cf. U.S. v. Robinson, supra,* at 1164-65. But here, the indefiniteness of the Government's proposal is actually a virtue. The defendants, so long as they are faithful to the goals of the plan, will have considerable independence and will be able to do what they feel is desirable to minimize the cost of

restoration. Therefore, the court is not overly troubled by certain lacunae in the record, especially given the equitable considerations applicable here. *See infra.*

Finally, turning to the equities of this case, we find that the defendants, with one exception, are not in a strong position to argue equity. As this court has found previously, as early as 1980 the defendants were aware of wetlands regulations and the possibility that Diamond Beach was within the jurisdiction of the Corps. In September 1983, the defendants acted in defiance of a "cease and desist" order of the Corps. 583 F. Supp. at 486, 487. Even after this court issued its preliminary injunction in April 1984, the defendants did not cease their fill activities, and Robert Ciampitti was cited for contempt in September, 1984. Even after that, fill activities continued on the site. Thus the equities do not weigh in the defendants' favor.

However, this court believes that the defendant Albrecht and Heun is in a better position to make an equitable argument. The record indicates that this defendant was merely a construction company which acted at the instance of the other defendants, and that its role was more or less passive. Moreover, this defendant does not appear to have a continuing interest in the site. Accordingly, Albrecht and Heun shall be excluded from this court's restoration order.

In sum, then, the court adopts the restoration plan proposed by the Government. We shall retain jurisdiction to resolve any disputes which may arise in either the preparation or implementation of the plan.

Finally, we must address the timing of the plan. We believe that restoration should occur as soon as possible. However, it seems both wasteful and unfair to the defendants to order restoration to proceed while there exists the possibilty that the development of the Diamond Beach may be approved by the Corps. Therefore, the court will stay the *implementation* of the restoration plan on the following conditions:

A. The defendants shall, within 45 days of the accompanying order, apply for a permit to engage in fill activities at the site.

B. If the defendants have not applied for a permit within 45 days of the order, then implementation of the plan shall proceed as scheduled in the order. Furthermore, if the defendants' permit application is returned for failure to meet the requirements of 33 C.F.R. § 325.1, then implementation shall proceed as scheduled in the order.

C. If defendants submit a proper application within 45 days of the accompanying order, then implementation of the restoration plan will be stayed pending a decision by the Corps on the application.

Of course, if the Corps grants the permit, the injunction and restoration order wil be vacated or modified as is appropriate. The stay conditions provided above only apply to the implementation phase of the restoration plan. The defendants will be required to *prepare* a plan within 60 days of the accompanying order.

E. *Civil Penalties*

The Government seeks the imposition of civil penalties against Robert Ciampitti only. Holding only this defendant liable is appropriate, given the statement of his attorney that he is the party responsible for the activities on the site and all the evidence consistent with this conclusion. This defendant clearly violated section 301(a) and 404 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1344, on at least 15 seperate days (including those violations occuring after the court's order of April, 1984). Section 309(d) of the Act, 33 U.S.C. § 1319(d), authorizes imposition of a penalty of up to $10,000 for each day on which a violation occurs. The Government urges that the flagrancy of Ciampitti's conduct warrants a substantial penalty.

The court does not entirely disagree. However, the question of penalties will be held in abeyance pending the preparation and implementation (if necessary) of the restoration plan. We believe this course is appropriate because it is more important that the site be restored than that the defendant Robert Ciampitti be punished. To the extent that Robert Ciampitti is not a person of unlimited resources, the court prefers that his resources be initially spent on clean-up of the site. *Cf. O'Leary, supra.* Furthermore, defendant Robert Ciampitti's good faith in preparing and implementing a restoration plan is a relevant factor in assessing the size or necessity of civil penalties.

The foregoing constitutes the court's findings of fact and conclusions of law pursuant to F.R. Civ. P. 52(a).

The accompanying order will be entered.

ie. pg 25a

/s/ John F. Gerry
JOHN R. GERRY, U.S.D.J.

DATED: November 28, 1984.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT C. CIAMPITTI, ALBRECHT AND HEUN CORPORATION, BRUCE N. CIAMPITTI and PACIFIC FOUR CORPORATION,

Defendants.

Civil Action No. 83-4004

ORDER

This matter having come before the court on the Government's request for preliminary and permanent relief; and the court having made findings of fact and conclusions of law pursuant to F.R. Civ. P. 52(a); and the court having concluded that the defendants have violated sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1344;

It is, this 28th day of November, 1984, hereby ORDERED as follows:

1. The defendants are permanently restrained and enjoined from allowing, suffering or causing the discharge of any pollutants or fill material (including sand, gravel, rocks, dirt, wood and concrete) from their properties located along Park Boulevard between West Jefferson Avenue and Madison Avenue and bounded on the west by Jarvis Sound in Lower Township, Cape May County, New Jersey (more particularly described in Lower Township tax records as Blocks 696, 701, 706, 716, 721, 726 and 731) into the waters of the site designated as wetlands on Government Trial Exhibit RR-5, and more particularly described in Government Exhibits 100-102, and Government Exhibit 43.

2. All of the fill, which is depicted on Government Exhibit 101 as the area shaded yellow, as well as all fill deposited subsequent to the preparation of Exhibit 101, down to the elevation of the wetlands as they existed prior to filling activities, shall be removed by the defendants, other than Albrecht and Heun Corporation, no later than 75 days after entry of this order.

Provided, however, that paragraph 2 of this order shall be stayed subject to the following conditions:

A. The defendants shall, within 45 days of the date of this order, apply for a permit to engage in fill activities at the site.

B. If the defendants have not applied for a permit within 45 days of the date of this order, then removal of the fill shall proceed as scheduled. Furthermore, if the defendants' permit application is returned for failure to meet the requirements of 33 C.F.R. § 325.1, then implementation shall proceed as scheduled.

C. If defendants submit a proper application within 45 days of this order, then removal of the fill will be stayed pending a decision by the Corps on the application.

3. The defendants, other than Albrecht and Heun Corporation, shall prepare and implement a plan to restore vegetation to the areas from which fill is removed in accordance with the following schedule:

A. Defendants shall submit a proposed plan for restoration and planting to the Corps of Engineers no later than 60 days after entry of this order;

B. The Corps of Engineers may approve the plan submitted or may modify the plan and approve the plan as modified;

C. The defendants shall complete all work necessary to implement the plan or modified plan no later than 45 days after approval by the Corps;

Provided, however, that paragraph C shall be stayed subject to the following conditions:

A. The defendants shall, within 45 days of the date of this order, apply for a permit to engage in fill activities at the site.

B. If the defendants have not applied for a permit within 45 days of the date of this order, then implementation of the plan shall proceed as scheduled. Furthermore, if the defendants' permit application is returned for failure to meet the requirements of 33 C.F.R. § 325.1, then implementation shall proceed as scheduled.

C. If defendants submit a proper application within 45 days of this order, then implementation of the restoration plan will be stayed pending a decision by the Corps on the application.

D. The plan described in paragraph 3A shall include, but not be limited to:

(1) Planting of all areas disturbed by the removal of fill material with plant species typical of areas adjacent to the areas of fill removal; i.e., *Spartina Alterniflora*, *Spartina Patens*, and *Distichlis Spicata*, and others as appropriate. Plantings shall be spaced on a grid with three foot by two foot centers. Plantings shall achieve 85% survival rate after the first growing season. Replanting would be required in areas of less than 85% survival rate;

(2) Preparation of a scaled drawing indicating the location of proposed wetland restoration and the elevations of restored areas at intervals sufficient to indicate that the depth of proposed excavation reflects natural changes in property contour;

(3) Restoration of all waterways within the subject property;

(4) A schedule of activities leading to completion of the wetlands restoration plan;

(5) A schedule of the rate and sequence of fertilizer application;

(6) Preparation of a post-restoration monitoring program;

(7) Identification of the location of disposal sites for material removed from the project site; and

(8) The defendants shall engage a consulting firm with established success in implementing wetland creation/restoration work, to prepare and implement the above restoration plan.

E. In the event there arises a dispute concerning the plan or any other provision of this order, any party may apply to the court to resolve such dispute.

4. The court shall retain jurisdiction on the issue of civil penalties pending implementation of the restoration plan.

/s/ John F. Gerry
JOHN F. GERRY, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

- - -

No. 85-5004

- - -

UNITED STATES OF AMERICA

vs.

DIAMOND BEACH DEVELOPMENT CORPORATION,
and ROBERT CIAMPITTI, ALBRECHT AND HEUN
CORPORATION
BRUCE NICHOLAS CIAMPITTI, and
PACIFIC FOUR CORP.

ROBERT CIAMPITTI, BRUCE N. CIAMPITTI and
PACIFIC FOUR CORPORATION,
Appellants

- - -

Appeal from the United States District Court
for the District of New Jersey-Camden
(D.C. Civil No. 83-4004)
District Judge: John F. Gerry

Argued
August 6, 1985
Before: *ALDISERT, Chief Judge,* and STAPLETON and MANSMANN, *Circuit Judges.*

JUDGEMENT ORDER

After consideration of all contentions raised by appellants, and for the reasons set forth in the district court opinion by the Honorable John F. Gerry, United States v. Ciampitti, No. 83-4004 (D.N.J., Nov. 28, 1984), *reprinted in* Appendix at 63-77; it is

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ Chief Judge Aldisert
Chief Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: AUG 7 1985

Supreme Court, U.S.
FILED
JAN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1002

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT CIAMPITTI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, federal jurisdiction to regulate discharges into "adjacent wetlands" is limited to areas below the mean high water mark.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 58a-59a) is unreported. The district court's opinion granting a preliminary injunction (Pet. App. 1a-35a) is reported at 583 F. Supp. 483. The district court's opinion granting a permanent injunction (Pet. App. 36a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1985. The petition for a writ of certiorari was filed on November 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344, the United States Army Corps of Engineers administers a permit program for the discharge

of dredged or fill material into "waters of the United States." See generally *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985). Without a Corps permit, such discharges are prohibited (33 U.S.C. 1311(a)). Under the Corps' regulations, "waters of the United States"—and hence the scope of the Corps' CWA regulatory jurisdiction—are defined to include, inter alia, "wetlands" that are "adjacent" to water bodies that are "subject to the ebb and flow of the tide" (33 C.F.R. 323.2(a)-(d)).[1]

Pursuant to Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, the Corps also administers a permit program for the building of structures and for excavating and filling in "navigable waters." See 33 C.F.R. Pt. 322. The scope of the Corps' regulatory jurisdiction under the Rivers and Harbors Act is more limited than under the Clean Water Act. See 33 C.F.R. 323.2(b) and Pt. 329. In waters subject to tidal action, federal regulatory jurisdiction under the Rivers and Harbors Act is asserted over areas below the "mean (average) high water" line (33 C.F.R. 329.12(a)(2)(b)).[2]

2. a. Petitioners own or sought to develop property known as the Diamond Beach site located in Cape May County, New Jersey. The Diamond Beach site is adjacent to

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[1]The regulations define the term "wetlands" as follows (33 C.F.R. 323.2(c)):

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

[2]Where possible, the mean high water line is determined by averaging tidal datum over an 18.6-year period. 33 C.F.R. 329.12(a)(2). "Marshlands and similar areas" are subject to Rivers and Harbors Act jurisdiction, "but only so far as the area is subject to inundation by the mean high waters." 33 C.F.R. 329.12(b).

Jarvis Sound, a large tidal body of water that is connected to the Atlantic Ocean. In late 1979 or 1980, petitioners commenced filling portions of the Diamond Beach site with sand (Pet. App. 10a). In 1983, petitioners had a 50-foot pipe and a tide gate placed on a corner of the site in order "to allow storm water to run off the site [and] *to prevent tidal water from coming onto the site*" (*id.* at 5a (emphasis in original)). Although the petitioner primarily responsible for these development activities, Robert Ciampitti, had been advised by his consultants by at least 1980 that areas on the site were probably "wetlands" subject to federal jurisdiction, petitioners did not apply to the Corps for a permit, nor did they contact the Corps to inquire about federal requirements (*id.* at 4a-5a).

When the Corps discovered petitioners' activities in 1983, a Corps official informed Ciampitti that the site contained wetlands subject to federal permitting jurisdiction and directed Ciampitti to halt filling activities in specified areas (Pet. App. 6a). Petitioners refused to comply with a cease and desist order subsequently issued by the Corps (*id.* at 7a-9a), and the United States initiated this action in the district court seeking to enjoin petitioners' unauthorized filling of wetlands and to require restoration of illegally-filled areas. The government also sought civil penalties against Robert Ciampitti. The statutory authorities relied upon by the government were the Clean Water Act, the Rivers and Harbors Act, and the Refuse Act (Pet. App. 3a).[3]

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[3]The Refuse Act, 33 U.S.C. 407, is a subsection of the Rivers and Harbors Act that prohibits, inter alia, the depositing of refuse in "navigable waters," as that term is defined under the Rivers and Harbors Act. The Clean Water Act permit program effectively superseded this provision of the Refuse Act, because a properly-issued Clean Water Act permit is deemed to constitute compliance with the Refuse Act (33 U.S.C. 1342(a)(5) and (k)).

Following evidentiary hearings, the district court entered a preliminary injunction and then a permanent injunction prohibiting further filling activity on approximately 26 acres of the property (Pet. App. 34a-35a, 39a, 54a). The district court also ordered some of the petitioners to apply for a Corps permit to engage in fill activities (*id.* at 55a). In the event that those petitioners failed to apply for a permit or a permit were denied, those petitioners were required to remove the illegally-placed fill and to prepare and implement a plan for restoration of the wetlands (*id.* at 55a-57a).[4]

b. The district court found that the area subject to the injunction against filling was an "adjacent wetland" under the Corps' regulations implementing the CWA. Prior to filling, the area was predominantly vegetated with plants adapted for life in frequently flooded or saturated soil (Pet. App. 11a). The soil in this 26-acre area was "saturated throughout, in most cases directly to the surface" (*ibid.*). The district court found (*id.* at 22a, 44a-45a) that both tidal waters flowing on the surface and groundwaters saturated the soil. Even with the illegally-deposited fill material, much of the area was covered with surface water, and, "without fill, tidal waters would normally flow onto the site" from two directions (*id.* at 12a, 22a).

At trial, the government also attempted to prove that 1.45 acres—all within the area designated as "wetlands" by the court—were below the mean high water line and, therefore, subject to the prohibitions of the Rivers and Harbors Act. Although there was no dispute that some of this 1.45-acre area was below the mean high water line, the district court

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[4]The district court held in abeyance the question of civil penalties against petitioner Robert Ciampitti (Pet. App. 53a, 57a). The court indicated that Ciampitti's efforts to prepare and implement a restoration plan would be considered in the court's later determination of the size or necessity for civil penalties (*id.* at 53a).

found the evidence too inconclusive to establish the precise boundaries of the area below the mean high water line (Pet. App. 39a-41a, 47a). Accordingly, the district court did not base any of the relief it ordered on violations of the Rivers and Harbors Act or the Refuse Act (Pet. App. 47a). Instead, the court premised the relief entirely on its conclusion that the area in question was a wetland subject to Clean Water Act jurisdiction.

On appeal by petitioners, the court of appeals affirmed without an opinion for the reasons set forth in the district court's opinion (Pet. App. 58a-59a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. a. At bottom, petitioners contend that because the district court found that somewhat less than 1.45 acres of the property is below the mean high water line, the courts below necessarily erred in holding that approximately 26 acres were "wetlands" subject to Clean Water Act jurisdiction. This contention confuses the jurisdictional reach of the Rivers and Harbors Act—which extends only up to the mean high water line (33 C.F.R. 329.12)—with that of the Clean Water Act (see page 2 & note 1, *supra*). Because the district court did not base the relief ordered on either the Rivers and Harbors Act or the Refuse Act, the location of the mean high water line is simply irrelevant to the disposition of this case.

This Court's decision in *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), unequivocally repudiates the notion that Clean Water Act jurisdiction over "adjacent wetlands" is bounded by the mean high water line. The Court in *Riverside* approved the Corps'

assertion of regulatory jurisdiction over "adjacent wetlands" and held that flooding from an adjacent water body is not required by the Corps' regulation defining "wetlands." Slip op. 7-8, 12-13. Rather, "saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation." Slip op. 8. In other words, there is no requirement that a "wetland" be located below the mean high water line nor that it be regularly inundated by tidal flow.

Here, the district court found, as a matter of fact, "the presence of both saturated soil and aquatic vegetation" in the area in question and further found that "the soil saturation 'causes' the growth of the vegetation" (Pet. App. 44a). The district court's findings plainly bring the property within the category of "wetlands" as defined by the Corps' regulation (33 C.F.R. 323.2(c)). Petitioners cannot plausibly dispute that the property is adjacent to a tidal waterbody. These findings establish that petitioners' property falls within the Corps' regulatory jurisdiction under Section 404 of the Clean Water Act. See *Riverside Bayview Homes, Inc.*, slip op. 9.

b. Petitioners erroneously argue (Pet. 4-6, 11-12) that there is a factual inconsistency between the district court's findings that somewhat less than 1.45 acres lie below the mean high water line (Pet. App. 39a-41a) and that "[d]uring normal high tide conditions, surface water covers a majority of the site" (*id.* at 12a). Petitioners apparently fail to recognize that the mean high water line is an average mark. Thus, by definition, tides will often rise higher than the mean. In addition, petitioners never acknowledge that the district court found that the wetlands are saturated by tidal surface waters *and* ground water (*id.* at 22a). Stated differently, the district court was clearly correct in observing (*id.* at 45a (emphasis in original)) that "the fact that we cannot

quite conclude that much of the land is below mean high water does not indicate, as [petitioners] argue, that it is not saturated by surface *or ground water*." Accordingly, the district court's factual findings as to tidal flow on the property present no question warranting this Court's review.

c. The case on which petitioners principally rely, *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935), is totally irrelevant to the delineation of Clean Water Act jurisdiction. That case, which predates the relevant provisions of the Clean Water Act by 37 years, involved a boundary dispute between an upland and a tideland owner. One contested issue was how the line of "ordinary high water"—the boundary under the governing federal law—was to be determined in view of the fact that the range of tides varies according to the lunar phase (296 U.S. at 23).[5] The rule of law governing such boundary disputes has nothing to do with Clean Water Act jurisdiction, nor is it even remotely relevant to the factual issue in this case—whether the disputed area is saturated with water.[6]

2. Petitioners' other contention (Pet. 12-16) is that the decision below conflicts with the court of appeals' decision in *United States* v. *Riverside Bayview Homes, Inc.*, 729

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[5]Specifically, the upland owner argued that the boundary should be established as the mean of high neap tides, which occur when the moon is in its first and third quarters and which do not, on average, rise as high as when the moon is in other phases. The Court instead adopted the rule that a mean of all tides, not just neap tides, determined the boundary. *Borax*, 296 U.S. at 26.

[6]Petitioners' argument (Pet. 12) that *Borax* requires, as a matter of law, that the district court's reference to "normal high tide conditions" in its factual findings be treated as synonymous with the legal term, "mean high water," as used in *Borax*, is incorrect. The district court clearly did not intend the reference to "normal high tide conditions" as a legal benchmark, but instead merely meant that it is not unusual for high tides to cover a substantial part of the property.

F.2d 391 (6th Cir. 1984), rev'd, No. 84-701 (Dec. 4, 1985). That contention, which we believe was without merit in any event (see Pet. App. 42a-45a), no longer warrants consideration in light of this Court's reversal of the Sixth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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